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Trial by Jury on the Eve of Revolution: The Virginia Experience

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I. INTRODUCTION

In the late summer of 1750, the Augusta County court convened its monthly session on Virginia's Shenandoah Valley frontier. During a single day the court conducted sixteen jury trials. In eleven of the sixteen cases, the court employed just two juries that passed judgment on (roughly) every other case. All eleven verdicts favored the plaintiff, a churchwarden and justice of the peace, and ten of

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The article extensively relies upon non-traditional primary source materials, including colonial county court records from Virginia. *See infra* notes 21 and 23. Since the original records are in handwritten form and available only on microfilm from the Virginia State Library and Archives (Richmond, VA), it was not reasonably practical for the UMKC Law Review to perform traditional cite checks on these sources. *See infra* note 76 and 236. Accordingly, interested readers are invited to contact Professor Blinka, the author, who has retained his research data. To further assist readers, citations to the county court records include the microfilm reel number, the approximate date, and, where available, the page number in the order book.

them carried identical findings: the jury assessed damages at 1000 pounds of tobacco.[1]

Sixteen trials in a single day? Eleven trials using two alternating jury panels that reached identical damages verdicts? From our present day vantage point, such proceedings appear anomalous and aberrant, suggesting perhaps a frontier court devoid of principle or acumen, and hardly the epitome of a "search for the truth." Yet the Augusta County trials fell within the mainstream of Virginia's late colonial legal culture and institutions. What then accounts for the gulf between the courtroom of the mid-eighteenth century and that of today?

Trials in colonial America differed vastly from those of today, yet on the surface there appear to be few fundamental differences. Centuries later one still finds the principals – judges, lawyers, parties, witnesses, and jurors – sitting in about the same places in the courtroom and apparently doing the same things. Parties complain, witnesses testify, lawyers argue, juries decide, and judges preside. Indeed, contemporary judges sit on elevated benches, dress in robes, and are among the only public officials routinely addressed in saccharine tones of respect ("Your Honor . . ."). At first blush the differences between colonial and modern courts, although significant, appear to be ones of degree. Modern trials bristle with phalanxes of refined rules and recondite procedures that are manipulated by specially trained lawyers. Courtroom dialogue features the familiar staccato "Q and A," whose rhythms are frequently interrupted by lawyers' objections (on a host of grounds alien to colonial courts). News coverage, "Court T.V.," and popular culture have made the modern trial a familiar event for most Americans.[2] Yet aside from the infusion of lawyers and rules, the trial is still presumed to serve its seemingly ancient function as a search for "the truth."

What do we know about jury trials in colonial North America? The short answer is not much and certainly not enough. In the early 1990s historians concurred that major gaps existed in our understanding of colonial legal systems and their role in social relations.[3] Two areas identified for future research were litigation generally and the function of juries.[4] What kinds of cases preoccupied the courts? How were disputes settled or decided? How did magistrates interact with lay people, parties, and jurors, and what might this reveal about social relations outside the courthouse?

Adding salience to these questions is our general ignorance about trials, particularly jury trials. Superb work has been done on British trials. The

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[1] *See infra* notes 185, 186, and 223. The eleventh case assessed the debt at 4,000 pounds of tobacco.

[2] *See, e.g.,* David Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream of World Justice,* 40 S. TEX. L. REV. 919 (1999).

[3] *See Forum: Explaining the Law in Early American History,* 50 WM. & MARY Q., 3d Ser., 3-180 (1993). *See also The Many Legalities of Early America* (Christopher L. Tomlins & Bruce H. Mann, eds., University of North Carolina Press 2001).

[4] *See* Terri L. Snyder, *Legal History of the Colonial South: Assessment and Suggestions, in* WM. & MARY Q., supra note 3, at 18-27; *see also* James A. Henretta & James D. Rice, *Law as Litigation: An Agenda for Research, id.* at 176-180.

distinguished historian J. M. Beattie has illuminated much of what we know in his careful, brilliant studies of English criminal courts in the late seventeenth and eighteenth centuries.[5] Martin Wiener has probed Victorian criminal courts for valuable insights into how changing social, cultural, and economic conditions affected nineteenth-century English criminal law and trials.[6] Recent scholarship has also explored the genesis of modern evidence doctrine.[7] Yet, for all this, as Wiener sagely observes, the "study of the trial itself has lagged."[8] We know remarkably little about the trial process and next to nothing about how judges and juries decided cases.[9] And despite the seminal work on British courts, the study of American trials has dawdled far behind.[10]

As part of an on-going study, I have mined the order books of several Virginia county courts, one from the tidewater (Fairfax) and the other on the frontier (Augusta), in order to examine juries, judges, and, most important, the trial process in mid-eighteenth-century Virginia. Although distressingly short on details, the order books open the world of ordinary cases by ordinary people in local courts, free of the distortion (and drama) that accompany "great" cases.[11]

Before leaping headlong into jury trials, however, it is imperative to understand the institutional primacy of pre-Revolutionary Virginia's county courts, which blended political, legal, and social authority. The institutional

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[5] J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986). *See also* J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries,* 9 LAW AND HISTORY REV. 221 (1991); Thomas Andrew Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, *1200-1800* (1985); John H. Langbein, *The Criminal Trial Before the Lawyers,* 45 U. CHI. L. REV. 263 (1978); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,* 50 U. CHI. L. REV. 1 (1983).

[6] Martin J. Wiener, *Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England,* 17 LAW & HISTORY REV. 467 (1999).

[7] *See* C.J.W. Allen, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997); T. P. Gallanis, *The Rise of Modern Evidence Law,* 84 IOWA L. REV., 499 (1999).

[8] *See* Wiener, *supra* note 6, at 470.

[9] *Id.* at 471.

[10] *Id.* Not nearly enough primary research has been done on North American cases. *See* F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828 (University Press of Virginia 1994). Miller has made a promising start on Virginia court records, although, as will be shown, I disagree with his premises. *See also* A. G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE (1981). Roeber has also burrowed deeply into the primary source materials, but his interest was not the trial and his findings are intertwined with efforts to explicate a "court/country" struggle for power. *See generally* John M. Murrin, *Magistrates, Sinners, and a Precious Liberty: Trial by Jury in Seventeenth-Century New England, in* SAINTS AND REVOLUTIONARIES IN EARLY AMERICAN HISTORY 152 (David B. Hall et. al., eds., Norton 1984); WILLIAM NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1820 (1975); Albert W. Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States,* 61 U. CHI. L. REV. 867 (1994); Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History,* 44 HASTINGS L.J. 579 (1993).

[11] Bruce Mann, *The Death and Transfiguration of Early American Legal History, in* THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 3, at 443-44. Bruce Mann has stressed the importance of trial records for social historians because they permit insight into "how law looked to people who were not themselves lawyers or judges." *Id.* at 444.

context is critical because jury trials were but one function of a court saddled with onerous and diverse responsibilities, which in turn shaped how juries were used, trials conducted, and decisions made. Although most familiar in their role at trial, colonial juries performed other vital functions as well, including helping to decide the placement of roads and the need for mills as well as serving as the community's conscience in grand jury proceedings. Juries, then, were not limited to adjudicating disputes, and these broader uses undoubtedly affected trials.

With the benefit of this broader institutional framework, we will examine the frequency of jury trials and the kinds of cases tried in the mid-eighteenth century. The order books reflect that mid-eighteenth-century Virginians frequently used juries to resolve disputes and at a rate that exceeds previous estimates by historians. Moreover, the vast majority of litigation concerned commercial disputes that were generally resolved in the plaintiffs' favor. The data shed light on the commercialization of Virginia's colonial legal system and challenge historians' assumptions that the Old Dominion's juries harbored an ill-defined anti-commercial ethos.[12] The data from Fairfax and Augusta also enrich, and complicate, our understanding of Virginians' cultural attitudes toward their commercial obligations.[13]

From here we turn to the heart of this study: the anatomy of the colonial trial and its role in eighteenth-century Virginia society. Unlike modern trials that purport to be quasi-scientific reconstructions of the past – a search "for the truth"[14] – colonial trials were marked by less hubris and pretension. Learning what had "in fact" occurred was important, but the jury considered "the facts" in light of local customs, traditions, and values.[15] In this context, the eighteenth-century trial rested on a vastly different epistemology.[16] Participants saw little need to draw hypertechnical distinctions between "evidence" presented in court and what jurors already "knew" prior to trial. Nor did pre-Revolutionary Virginians suffer post-modern despair over the loss of certitude and objective truth. The colonial courtroom was not a "laboratory of the truth," at least not in

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[12] *See infra* note 163 and accompanying text.

[13] David Thomas Konig, *The Virgin and the Virgin's Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law, in* THE HISTORY OF LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT, 1692-1992, 81-115 (Russell K. Osgood, ed., Boston 1992).

[14] *See, e.g.*, United States v. Wilensky, 757 F.2d 594 (3d Cir. 1985); United States v. Jones, 730 F.2d 593 (10th Cir. 1984).

[15] Modern juries are told to decide cases according to the judge's instructions on law. *See* MCCORMICK ON EVIDENCE § 51, n.1 (John W. Strong, ed., 5th ed. West Group, 1999) ("The fact issues at the trial should be decided upon the evidence 'in the record,' i.e., facts officially introduced in accordance with the rules of practice and those the court may judicially notice."). Usually, local customs, values, and traditions must be proven by witnesses or "judicially noticed" by the judge.

[16] Historians are coming to appreciate the relationship between otherwise dry legal rules and prevailing epistemology. *See* Holly Brewer, *Age of Reason? Children, Testimony, and Consent in Early America, in* THE MANY LEGALITIES, *supra* note 3, at 293-332.

the sense of reconstructing the historical record.[17] Rather, in the words of the First Continental Congress, the jury's role was to gauge the "general welfare."[18] Eighteenth-century trials, then, resolved disputes within an institutional framework that reflected the aspirations, if not the reality, of a distinct social order.

More precisely, the courtroom embodied the essence of a hierarchical society, and colonial trials can be understood as an attempt to institutionalize deference while stabilizing a society increasingly marked by individualism, materialism, and acquisitiveness. Although today's courtrooms bear a striking architectural resemblance to those of the eighteenth century, the meanings of these physical spaces and public places have shifted dramatically. The modern courthouse symbolizes our veneration for ordered liberty and the rule of law. The colonial courthouse reflected something even grander: an ideal ordering of society itself that literally put people in their assigned places - socially, politically, and physically. Most graphically, the bench perched the justices above all present while the bar separated the merely curious from those who possessed some measure of influence.

Though rarely articulated, the trial's epistemology reflected similar values. Viva voce testimony highlighted the value of face-to-face interaction among all social orders. Verdicts blurred testimony by witnesses – the "evidences" – with the jury's own knowledge of events, people, local customs, and the law. Character and reputation, which crudely calibrated one's place in society, played a central role, while the jury, consisting of men of at least modest standing within the community, took its own measure of parties and witnesses. Finally, verdicts often came with little or no deliberation by juries that sometimes never left the courtroom. Shared assumptions, unspoken and often emotional, loomed as large as anything witnesses said. Of course, tension pervaded the courthouse as one might well expect in a forum designated for conflict. Yet strain also arose from a fundamental contradiction between what the court stood for and what it did, or, more prosaically, between its form and function. While the trial enshrined and instilled hierarchical values, it simultaneously facilitated the workings of an increasingly commercialized society that rested upon very different assumptions. In sum, the eighteenth-century trial was the set piece of a hierarchical society; getting at "the truth" was one consideration among many. It is, then, this "old-style trial" that I wish to scrutinize.[19]

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[17] *See* FED. R. EVID. 102 ("to the end that the truth may be ascertained and proceedings justly determined"). In future articles I hope to demonstrate that the trial as "laboratory of the truth" was a product of the Revolution that evolved throughout the nineteenth century and assumed its familiar modern form in the early twentieth century.

[18] *Address to the "Inhabitants of Quebec," in* CONTEXTS OF THE CONSTITUTION 693 (Neil H. Cogan, ed., Foundation Press 1999).

[19] *See* BEATTIE, CRIME AND THE COURTS IN ENGLAND, *supra* note 5, at 340-352, which nicely summarizes the essence of the "old form" (criminal) trial, which did not give way to its modern progenitor until the early nineteenth century. *See also* Beattie, *Scales of Justice*, *supra* note 5, at 231-32, 256 (observing that the "old" trial reposed wide discretion both in juries and judges, and made the defendant's "background and character" as equally or perhaps more important than the

In order to understand fully eighteenth-century trial process and the role juries played, it is first necessary to appreciate the special role played by Virginia's county courts, whose enormous, diverse workload directly affected the conduct of trials.

II. THE COLONIAL COUNTY COURTS

First established during the 1630s, the county courts were the bedrock of Virginia government, touching nearly every facet of life, social and economic, and, in turn, reflecting the communities they served.[20] Eighteenth-century Virginia had no urban centers that rivaled Boston, Philadelphia, or even Charleston. Its population was scattered among the plantations and farms that produced tobacco and wheat for export as well as local consumption. In short, the dispersed, decentralized system of county courts was well suited to Virginia's economic and social environment.

The justices of the peace (magistrates) operated and controlled the county courts. Although colonial governors appointed magistrates, selections came from lists already approved by the local courts. Once appointed, justices served until their names were removed from the commission, usually at their own request. George Mason, the principal author of Virginia's Declaration of Rights and its state constitution in 1776, served as a justice of the peace in Fairfax County for forty years until his resignation in 1789.[21]

The size of the commission varied among counties. At least eight justices per county were commissioned, although the number was frequently greater.[22] Augusta's commission, for example, swelled to thirty-three by 1750.[23] The burgeoning commission helped ensure a quorum (four justices) and sated the ambitions of locally influential men seeking status and authority. Attendance by

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"factual evidence"). In sum, Beattie observes that the old-style British criminal trial, which resembled a sentencing hearing that considered the defendant's background and character, later evolved into a far more formal, ritualized proceedings controlled by lawyers and which enshrined "the value of advocacy as a means of truth finding." *Id.*

Today, of course, many of these same features (e.g., viva voce testimony) carry vastly different meanings in the modern trial, a development that will be addressed in future research.

[20] George M. Curtis, The Virginia Courts During the Revolution 52-53 (1970) (unpublished Ph.D. dissertation, University of Wisconsin) ("the full operation of the courts brought judges into contact with every conceivable interest and activity within the county's domain"). *See* 4 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES , Note A, 9-10 (1803; reprint, Paul Finkelman & David Cobin, eds., The Lawbook Exchange 1996) (outlining the local courts' sweeping responsibilities).

[21] Fairfax County, Virginia, Order Books (17 August 1789), *microformed on* Virginia State Historical Society, Reel 40. Addressing the "worshipful court," Mason asked that his letter of resignation be entered of record that "I may not be subjected to censure for refusing to execute the duties of an office which I no longer hold." For a brief sketch of Mason's life, see 1 THE PAPERS OF GEORGE MASON, cxiv (Robert Rutland, ed., University of North Carolina Press 1970).

[22] *The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619*, 5: 489 (William W. Hening, ed., University Press of Virginia 1969, facsimile reprint).

[23] Augusta County, Virginia, Order Books (March 1749/50), *microformed on* Virginia State Historical Society, Reel 62.

the justices was, however, spotty and uneven.[24] Some faithfully attended nearly every session.[25] Others were not as diligent. George Mason appeared as a presiding magistrate on just one day during a three-year period.[26]

The justices were men of property and standing in the county. For example, in March 1750 the six presiding Fairfax magistrates included Thomas Fairfax himself, the proprietor of the Northern Neck and the Sixth Lord Fairfax, as well as his cousin William Fairfax, who was Thomas's agent for the Northern Neck estates, a militia officer, a vestryman, a burgess, and a member of the Virginia Council.[27] Also present was John Colville, a former sea captain and merchant who eventually garnered enough local influence to be elected a burgess.[28]

The justices and jurors who looked after the community's general health and safety also had a direct stake in the court's business. Even while presiding at the sessions, justices frequently appeared as witnesses and litigants.[29] They also reaped the rewards of various official appointments. On the single day that George Mason deigned to preside between 1749 and 1751, the court confirmed Mason's right to operate the ferry at Occaquou Creek and awarded him 1500 pounds of tobacco, perhaps to help defray costs.[30] Personal preferment was not limited to Mason or, for that matter, to justices. Virginia's tobacco inspection act placed four warehouses in Fairfax county and required county courts to recommend inspectors for appointment by the General Assembly. Four lists were prepared; one for each warehouse, and on each list there appeared the names of the presiding magistrates and selected grand jurors.[31] Thus, service on the court entitled one to potentially lucrative and authoritative posts.

In sum, justices and grand jurors adroitly used their positions to consolidate power and to build wealth. Although the modern eye quickly detects the stains

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[24] *Id.*

[25] *Id.*

[26] *See* Fairfax County, *supra* note 21, at Reel 37 (December 1749 through December 1752). I examined all Fairfax County order book entries between December 1749 and December 1752. Mason's sole appearance came on 29 March 1751.

[27] *Id.*

[28] *Id.* at Reel 37 (March 28, 1750). For biographical information, I relied on *The Papers of George Mason, supra* note 21, at 1: xliii. Also present were Gentlemen Charles Broadwater, John Minor, and [illegible] Linton, for whom no biographical information could be located.

[29] *See infra* notes 30-32, 186, and 302.

[30] *See* Fairfax County, *supra* note 21, Reel 37 (March 29, 1751). More accurately, the court confirmed Mason's right to continue the ferry's operation. The Occaquou Ferry traversed the Occaquou Creek just west of its confluence with the Potomac River. The ferry connected Prince William County with Fairfax. The right to operate the ferry had been in Mason's family since 1684 but apparently required renewal. George Mason's will conferred the right to run the ferry to his son, Thomas, who later built a toll bridge. *See The Papers of George Mason, supra* note 21, at 1: lxxxiv. Thus, the American Revolution might have formally eradicated heritable office holding, but the devise of public utility holdings emerged unscathed.

[31] *See* Fairfax County, *supra* note 21, at Reel 37 (September 26, 1750). The four Fairfax warehouses were located at the Falls of the Potomac and at Hunting, Polick, and Occaquou creeks. This also implies a geographic representation across the county on the grand jury. One can reasonably assume that the prospective inspectors sought appointment to warehouses nearest their homes.

of self-dealing and "conflict of interest," it was neither extraordinary nor seemingly inappropriate for eighteenth-century magistrates to appear in their own courts, profit from their position, or hold multiple offices. After all, it was their experience and active engagement in local life that secured a magistrate's commission in the first place.[32]

Their wealth, social standing, and local influence notwithstanding, many justices were not lawyers but instead acquired whatever legal knowledge they needed, or wanted, by sharing experiences and reading popular manuals.[33] George Mason never practiced law or received anything resembling legal training, yet he contributed enormously to American legal culture. Well-read and tutored in Latin, Mason drew from his experience as justice, frequent litigant, commercial planter, and land speculator.[34] Mason was not the norm; some justices reveled in their non-technical, common sense approach to decision-making. Landon Carter, a Richmond County justice from 1734 until his death in 1778, openly disparaged the performance of "trained" lawyers whose "mechanical knowledge" consisted only of "knowing from whom to copy properly."[35] Not everyone saw such homespun wisdom as a blessing. Thomas Jefferson's experience as a young lawyer left him with ill-concealed contempt for local courts, whose bar he likened to an "infestation of insects."[36] Others criticized magistrates for laziness, legal ineptitude, and shameless partiality.[37] Historians have been scarcely kinder.[38]

While critics make telling points, some perspective is necessary. Although there is no defense for greed, sloth, and neglect of duty, these traits are hardly endemic to eighteenth-century public service. Moreover, one must consider the workload and multiplicity of tasks imposed on the county courts.

The county courts had broad authority over civil and criminal cases that did not fall within the General Court's (the colony's central court) jurisdiction. In 1748 Virginia's legislature, the General Assembly, revised county court procedures as part of its broader effort to clarify the colony's law. The revision empowered county courts "to hear and determine all causes whatsoever, at the

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[32] Colonial Virginians were not completely blind to the dangers of avarice and overreaching. In the 1730s a "place bill" barred tobacco officials from assorted "political activity." WARREN BILLINGS, et. al., COLONIAL VIRGINIA 244 (1986). The place bill related more to the heated fight over the inspection act itself than to particular problems with individuals profiting from multiple posts.

[33] *See* WILLIAM H. BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA xxii (University Press of Virginia 1978) ("the legal manuals and guidebooks for lawyers were most frequently found in colonial libraries").

[34] *See* 1 THE PAPERS OF GEORGE MASON, *supra* note 21, at cxii-cxiv.

[35] 1 THE DIARY OF COLONEL LANDON CARTER 93 (Jack P. Greene, ed., 1965).

[36] *See* FRANK L. DEWEY, THOMAS JEFFERSON: LAWYER Appendix B (1986).

[37] For James Madison's criticisms, see ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, *supra* note 10, at 192-96.

[38] Roeber traces the struggle between untutored "country justice" in the local courts and the learned, technically refined "court justice" espoused by trained professionals and – so it happened – court reformers. Although Roeber exhibits the customary scholarly detachment, he concludes with a pox on both their houses and observes that "[t]he replacement of familial oligarchies with cerebral and professional cabals struck many Virginians as thoroughly suspect." *Id.* at 235.

common law or in chancery, within their respective counties."[39] A single justice of the peace could determine disputes of less than twenty-five shillings or 200 pounds of tobacco. Other civil cases and minor criminal offenses were heard by the county court sitting at its monthly session.[40] The 1748 act served as a virtual roadmap for local courts, setting forth detailed directives governing oaths, attachments, bail, lawyers' fees, debt actions, chancery procedures, witnesses, and the use of "ducking stools."[41] Writing in 1803, St. George Tucker accurately captured the jumbled nature of the courts' business in their quarterly and regular monthly sessions. While specifically addressing county court practice in the 1790s, Tucker's descriptions held true for the preceding sixty years as well:

> At their quarterly sessions a grand jury is sworn to make presentments of all breaches of the penal laws of the commonwealth, and such presentments as have been before made, and all other prosecutions in behalf of the commonwealth as well as civil suits at common law and in chancery, where the claim exceeds twenty dollars or 800 lbs. of tobacco are to be tried at the quarterly sessions. At the remaining eight sessions petitions for small debts, or for trover and conversion, or the detention of anything not exceeding twenty dollars or eight hundred pounds of tobacco, are to be tried. Deeds and wills may be proved, administrations of intestate's estates granted, poor orphans may be directed to be bound out by overseers of the poor; and guardians and committees of infants, idiots, lunatics and their estates, be appointed; justices, sheriffs and coroners, and officers of the militia, when necessary, may be recommended to the executive; and surveyors of highways, and constables appointed. Injunctions in chancery may likewise be granted or dissolved and all chancery causes therein depending, tried, in like manner as at the quarterly sessions . . . .[42]

At only slight risk of overstatement, the county courts suffered from institutional incoherence. The diversity of responsibilities was breathtaking. Historians have anachronistically catalogued the county courts' duties as administrative, legislative, or judicial, but this conveys a false sense of order and rationality.[43] There is no evidence that eighteenth-century magistrates, the parties before them, or even the General Assembly that continually heaped new duties upon them, drew any such distinctions. More likely, the magistrates' diverse responsibilities melded imperceptibly into one another, blurring such finely honed distinctions. And their lack of legal training guaranteed a reliance on past experiences and "common sense."

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[39] *See The Statutes at Large*, *supra* note 22, at 5: 489-508.
[40] *Id.* at 5: 493.
[41] *Id.* at 5: 508.
[42] *See* 4 TUCKER, *supra* note 20, at Note A, 9-10.
[43] *See* Curtis, *supra* note 20; *see also* Tadahisa Kuroda, The County Court System of Virginia from the Revolution to the Civil War, chapter 2 (1969) (unpublished Ph.D. dissertation, Columbia University).

Colonial statutes provide some insight into the cacophony of duties. First, county courts served as Virginia's primary fiscal agent.[44] Once each year the county court set the local levy, which determined the tax owed by residents for necessary services. Monies were set aside for such things as cleaning and maintaining the courthouse and jail, the purchase of law books, and the procurement of paper and order books to record the court's business.[45] The local court also supervised the collection of revenue on the colony's behalf. Taxes on land and carriages, for example, imposed the twin burdens of accounting and collection.[46]

Second, local courts were charged with the development of the local infrastructure. The General Assembly empowered county courts to determine the need for roads, bridges, and grain mills, sometimes with the assistance of juries. When promoters proposed to establish a mill, the justices decided whether it was needed and a jury of twelve freeholders assessed expected damages.[47] Applications for bridges or highways resulted in the appointment of "three or more fit and able persons" to report on the "convenience or inconvenience" of the proposal.[48] The court also supervised the maintenance of existing roads, and order books are replete with prosecutions against road overseers who neglected to keep roads clear.[49]

Third, the county courts were responsible for supervising and inspecting an ever-expanding range of economic activities. Since the 1600s, the courts had regulated ordinaries (inns and taverns), even setting prices charged for libation. By the 1750s the courts' regulatory duties had lengthened considerably. Justices set the rates for ferries, inspected tobacco, and recorded the sale of slaves to protect against fraud.[50] They also inspected pork, flour, tar, pitch, and turpentine.[51] In all of this the General Assembly simply assumed the justices' competence to perform the myriad tasks. Justices were, for example, required to personally view cattle before sale and issue a "bill of health."[52] Apparently, one's commission as a justice of the peace carried with it a presumption that the individual knew enough about roads, ferries, the local economy, sundry farm animals, and crops to execute these duties adequately.[53]

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[44] For a general discussion of "fiscal" authority, *see* ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 47 (1998).

[45] *See* Augusta County, *supra* note 23, at Reel 62 (20 November 1746), where the court authorized repairs to the courthouse and set aside 8,000 pounds of tobacco for law books, record books, and sundry necessities.

[46] *See The Statutes at Large*, *supra* note 22, at 7: 262-65 (carriage and land taxes).

[47] *Id.* at 6: 55-60.

[48] *Id.* at 6: 64.

[49] *See, e.g.*, Fairfax County, *supra* note 21, at Reel 37 (March 27, 1750); *see also* Augusta County, *supra* note 23, at Reel 62 (Nov. 28, 1750).

[50] *See The Statutes at Large*, *supra* note 22, at 8: 318 (tobacco inspection) and 7: 118 (slaves).

[51] *Id.* at 7: 570.

[52] *Id.* at 8: 245-46.

[53] *See id.* at 8: 354. The General Assembly did not blindly and guilelessly assume that the county courts performed their work flawlessly. Many burgesses had served on the courts and remained

Finally, in addition to taxes, internal improvements, and economic regulation, the courts oversaw the county's general welfare. Magistrates assigned a steady flow of orphans and illegitimate children to families who cared for them while using their labor. The county courts also established local "hospitals" for the care of the insane. (Besides their assumed expertise in evaluating cattle, pork, and tobacco, the justices "examined" persons for insanity as well.)[54] In short, it may be said without exaggeration that county courts touched on all matters of public life.

What effect did this have on the eighteenth-century trial? The order books for Fairfax and Augusta counties reflect a wildly random quality which in turn betrays a numbing routine of licensing ordinaries, conferring military commissions, listening to servants' pleas, appointing road overseers, hearing presentments, granting judgments, conducting trials, continuing cases, permitting attachments – hour after hour, day after day.[55] One must consider how this diverse, heavy workload affected Virginians' conduct at "court day."

Rhys Isaac has brilliantly explained how Virginians comprehended social and legal authority through their participation at court day.[56] In serving a predominantly oral culture with a low literacy level, the courts proceeded *viva voce*. Spoken oaths declared to all assembled one's rights and obligations as a justice, militia officer, local official, juror, or witness. Deeds were read aloud. Witnesses appeared in court under oath and declared what they knew about a matter. (Written depositions were taken and used only where a witness was unavailable.)[57] The justices pronounced their decisions from the bench. Brandings and whippings publicly displayed the court's disapprobation of misconduct.[58] Middling and lower orders were not silent spectators or passive recipients; rather they actively participated as parties, witnesses, and jurors. Justices dispensed a "great many favors" to those of modest standing to help them through troubled circumstances.[59] In sum, the court used law to reinforce a hierarchical social order mediated by deference. The image did not always reflect the reality, but the gentry proceeded as though it did.

Isaac vividly captures the essence of court day's meaning, but the image is almost too dynamic, too resonant. Lost in the colorful, dramatic recreation is the repetition, monotony, and sheer tedium of the court's business.[60] There was seldom a single "court day." More accurately, there were "court sessions" that stretched for days. Normally the justices needed from several days to a week to

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active in local affairs. They were doubtlessly aware of its shortcomings. For example, an effort to regulate stray horses was repealed because of numerous "frauds." *Id.*

[54] *Id.* at 8: 378.

[55] *See* Augusta County, *supra* note 23, at Reel 62 (November 1746).

[56] RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 93 (1982); *See also* ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, *supra* note 10, at ch. 3.

[57] *See The Statutes at Large*, *supra* note 22, at 6: 337

[58] *See* ISSAC, *supra* note 56, at 92.

[59] *Id.* at 88-94.

[60] *Id.* Isaac does, to be sure, comment on the "routine" nature of the courts' dockets, but the dull grays are subsumed by the brilliant colors used to paint "court day."

complete their business even during sessions where no jury trials were conducted. "Court day" is like a snapshot taken at a party; it captures a moment at the expense of all that occurred before and after. To the uninvited looking at the picture alone, the party probably appears to have been more exciting than it really was.

Monotony is seldom emphasized (consciously) by historians; it is, after all, tedious to describe what is dull and uneventful. But when imagining "court day" the historian must also contemplate the dull cacophony of lawyers, litigants, and witnesses who droned on hour after hour, day after day, month after month for years. Not every act was a conscious celebration of a hierarchical social order. The justices may have styled themselves as an elite, but in practice their authority depended upon the cooperation and input of lesser men, particularly clerks, jurors, and parties.[61] Nevertheless, each matter required the court's attention. Imagine cold damp courtrooms with bad lighting. Imagine the tedium of land deeds read aloud in a hurried monotone. Imagine the fatigue and drowsiness. Imagine the pile of work that remained despite hours of toil. Imagine ungrateful litigants displeased with the court's decisions. Reading order books is difficult largely because the entries are so monotonous. But the tedium reveals the kinds of decisions the courts made, the rhythm of the proceedings, and clues about how decisions were reached. "Separation of powers" is unrecognizable because administrative, judicial, and legislative functions blended imperceptibly into one another.

In essence, the order books reflect a random presentation of a large number of extraordinarily diverse matters. Not surprisingly, decisions were made reflexively, based on custom, tradition, and experience. Presided over by a gentry notably devoid of legal training or extensive education, the court also depended upon active participation by the largely illiterate lower and middling orders as jurors, witnesses, minor appointees, and spectators who honored its actions. Undoubtedly, the very same people approached trials in much the same way they decided the remainder of the court's multifarious business.[62]

III. NON-ADJUDICATIVE JURIES

Colonial Virginians used juries in diverse ways. At times juries performed like *ad hoc* commissions that decided policy about matters of local social or economic life. Their influence should not, however, be exaggerated, for neither the justices nor the clerks ever surrendered control of their courts. Non-adjudicative juries appear to have been used relatively infrequently. The multiple uses of juries nevertheless opened a narrow channel for some level of popular

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[61] David Konig, *Courthouse of 1770 Historical Report, Blk. 19, Bldg.* at 9-10, 25-26, originally entitled, *The Williamsburg Courthouse, A Research Report and Interpretive Guide* (Williamsburg, Va. 1987). Konig concludes that "the extent of gentry participation and domination has been considerably exaggerated." *Id.* at 25.

[62] Elsewhere I have tracked the "daily grind" that characterized the courts' sessions. *See* Daniel D. Blinka, Trial by Jury in Revolutionary Virginia: Old-Style Trials in the New Republic (2001) (unpublished Ph.D. dissertation, University of Wisconsin – Madison).

participation in court decisions that affected not just litigants, but also the broader public. Moreover, such uses illustrate that colonial Americans had a more expansive conception of the jury than we have today.

Juries were used, for instance, to determine when roads were necessary and where they should be located.[63] The opinion of twelve citizens, ratified by the court, probably enhanced the decision's acceptance within the community. As freeholders, the jurors were familiar with the land and the community's needs. No records survive of their deliberations, but road juries would have considered who lived near the proposed route, its likely use, and the expense of building and maintaining the road.

Juries also assisted in the decision to build a new mill. Gristmills required dams that flooded neighbors' property. Once a promoter filed a petition to construct a mill, the court appointed "twelve freeholders" to view the land, value the affected property, and determine damages.[64] Note that the law restricted the jury to ascertaining "value" and "damages"; technically, the court decided the reasonableness of the project (meaning its need).[65] Regardless, the jury's calculation of damages probably determined the feasibility of the proposal. In a capital-starved economy, a large damage award could make the mill too costly to build. Conversely, a lower award might make the project economically attractive and increase the value of adjacent property.

Colonial Virginians routinely employed grand juries, which exerted more influence than occasional road and mill juries. Grand juries are most familiar in their role as protectors of local health, safety, and morals. They convened twice annually and presented alleged lawbreakers for prosecution. By law, county grand jurors were freeholders who were not "ordinary keepers, constables, surveyors of highways, or owners or occupiers of a mill," those excluded being the ones more likely to come under the body's scrutiny.[66] Before the assembled public at court day, local justices instructed grand juries about the law and any especially noteworthy incidents that merited consideration. The grand jury then deliberated before returning with a list of presentments (charges). Although colonial grand juries generally consisted of sixteen persons, a presentment could be based on the knowledge of just two of its members. This rather generous ratio of one to eight maximized the grand jury's potential to present offenders.[67] Unless the offender pleaded guilty, however, punishment could not be meted out unless a trial (petit) jury found guilt.

Many presentments involved the community's moral climate and social well being. For example, in March 1750 the Fairfax County grand jury returned

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[63] *See* Kuroda, *supra* note 43, at 123.

[64] *See The Statutes at Large*, *supra* note 22, at 6: 55-60.

[65] *See* Fairfax County, *supra* note 21, at Reel 37 (September 27, 1750) (recording a jury's report on a petition to build a mill).

[66] *See The Statutes at Large*, *supra* note 22, at 6: 523.

[67] *Id.* at 525 ("That no grand jury shall make any presentments of their own knowledge, upon the information of less than two of their own body."). *See also* Gwenda Morgan, *Law and Social Change in Colonial Virginia: The Role of the Grand Jury in Richmond County, 1692-1776*, 95 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 453 (1987).

thirteen presentments. Two persons were accused of being "common swearers" and one of maintaining a "tippling house on the Sabbath." Illegitimate children garnered the most attention because they affected the county's fiscal as well as moral health. Seven presentments involved "base born" children, and one charged both a man and a woman with "cohabiting contrary to law." The remaining two presentments named road overseers who had failed to maintain roads.[68]

Grand juries also functioned as special commissions that investigated and punished tax scofflaws. During the French and Indian War, Virginia experienced extraordinary difficulty raising money for defense. Frustrated by an inability to collect taxes, the General Assembly directed that grand juries inquire into who had failed to pay taxes on land and carriages, especially tenants on the property of Lord Fairfax (the Northern Neck).[69] Upon presentment, the accused was to be tried "without the formality of a jury" at the next court session.[70] Thus, the General Assembly itself admonished local grand juries to identify and present law breakers (here tax evaders), a role usually reserved to local judges.[71] To safeguard against overly compassionate trial juries, which often consisted of bystanders and citizens of lesser standing, the statute stripped the accused of the right to jury and placed the onus to collect taxes on the magistrates.[72]

In sum, colonial Virginia employed juries in more expansive ways than the relatively limited roles assigned to modern trial and grand juries. The colonial jury injected a level of popular participation in governmental decision-making at a time when the only elective office in Virginia was the House of Burgesses, whose members came from society's upper echelons and stood for election infrequently.[73] Moreover, non-adjudicative juries allowed Virginians to address broader public problems that had not taken the form of disputes between private litigants.[74] Building roads, placing mills, or presenting tax scofflaws all drew upon the jury's collective judgment about the community's best interests. Nonetheless, juries were used far more frequently to adjudicate disputes.[75] It is one thing to recognize the jury's potential as a means of popular participation and quite another to establish whether it actually played this role in the courts. For this purpose, we must turn to the county court records and examine how often trial juries were used and for what purposes.

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[68] *See* Fairfax County, *supra* note 21, at Reel 37 (March 27, 1750 and September 26, 1750). In September, 1750, the grand jury issued nine presentments: six involved "swearing," one named a "common disturber," one involved a road overseer, and the ninth presented a man for living in fornication with a woman.

[69] NORMAN RISJORD, CHESAPEAKE POLITICS, 1781-1801 at 21-22 (1978) (describing the Northern Neck). The Fairfax devise consisted of much of Virginia's Northern Neck, including the region between the Potomac and the Rappahannock rivers and extending from the Chesapeake to the Blue Ridge Mountains.

[70] *See The Statutes at Large*, *supra* note 22, at 7: 225.

[71] *Id.*

[72] *Id.*

[73] *See* Billings, *supra* note 32, at 246-47.

[74] The best examples of this are the road and mill juries.

[75] *See infra* text accompanying notes 77-89.

IV. TRIAL JURIES IN COLONIAL VIRGINIA

The county courts regularly used juries to adjudicate disputes and at a rate that exceeds earlier estimates by historians. The records of the Fairfax and Augusta county courts reflect how often juries were used, the kinds of cases they decided, and the verdicts rendered.

Fairfax and Augusta counties represent two very different places in colonial Virginia. Located in the tidewater, Fairfax County was deeply immersed in the Atlantic economy and boasted an elite that played a vital role in the Revolution. Augusta County falls at the other extreme, geographically, economically, and socially. Set in Virginia's beautiful Great Valley, Augusta County represents the eighteenth-century frontier, where settlers usually of far more modest means struggled to subsist despite isolation, poor transportation, and endemic violence.

It is important to understand the nature of the court records used in this study. The order books describe the daily business before the court. In a sense, they are a chronological log of what the court did; as a result, entries are not limited to litigation. As we saw earlier, interspersed among settlements, continuances, and jury verdicts are commissions for militia commands, appointments of road overseers, lists of tithables, and the recording (oral) of deeds and other legal documents. The cacophony of official business yields a critical insight: the nature of the courts' widely varied responsibilities did not permit a nice compartmentalization of what we recognize as judicial, administrative, or legislative functions. Furthermore much of the work was tedious and tiring. The clerk's first entries of the morning are usually in a neat, legible hand that deteriorated to a quivering scrawl by day's end. No doubt the clerk's numbed fingers reflect the flickering attention of others present as well.[76]

A. Frequency and Timing of Jury Trials

Familiar events in late-colonial Virginia, jury trials occurred in every year examined, although in widely varying numbers. Moreover, their random quality yields insights into the nature of the colonial trial. For both Augusta and Fairfax counties, my goal was to examine the courts' business in the years before the imperial crisis of the mid-1760s. The years were selected at random and care was taken to sample court business before and during the French and Indian War.

The data also fuel a smoldering controversy over the popularity of jury trials in Virginia before the Revolution.[77] Earlier studies argue that before 1750 "juries probably held a less conspicuous position in Virginia than in any other mainland

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[76] *See* Konig, *supra* note 61, at 123. Konig's research reveals that clerks prepared the order book entries at some later time, based on notes made on the "loose papers" that were later bundled together in the chronological order of the court's actions. My own reading suggests that some order book entries may have been made at the time of the court's action. Not only did the handwriting deteriorate later in the day's entries, but also a justice occasionally filled for an absent clerk. At any rate, it seems clear that the books reflected the order in which the court took up its business.

[77] *See* John M. Murrin & A. G. Roeber, *Trial by Jury: The Virginia Paradox* (Parts 1 and 2) 34 VIRGINIA CAVALCADE 53, 118 (1984-85).

province."[78] Although historians found that juries were used more frequently after 1750, their numerical estimates were considerably lower than the findings reported below. One study estimates that some tidewater counties annually averaged about five jury trials before 1750, from eleven to twenty during the 1760s, and about thirty in 1770.[79] The Augusta and Fairfax records reveal a far more robust use of juries by the early 1750s.

The Fairfax court regularly heard trials. In the three-year period from 1750 through 1752 it conducted sixty jury trials, which, as Table 1 reveals, were far from evenly distributed. In 1758 alone the court heard fifty-two trials.

Table 1
Number of Fairfax Jury Trials[80]

Year	1750	1751	1752	1758
Number of Trials	42	3	15	52

The annual fluctuation is remarkable and puzzling. There is no way of knowing why 70% of the juries observed between 1750 and 1752 occurred in a single year, 1750, and no obvious explanation for a diminished use of juries in 1751 and 1752. Yet in 1758, in the midst of the French and Indian War, the Fairfax court conducted fifty-two jury trials. The fluctuation exhibits randomness not explicable from the records.

Even though situated on the frontier during turbulent times, the Augusta court also regularly used juries. The fragmentary records for 1745, the county's first, reveal no jury trials, but Table 2 reveals that they became a common feature in later years.

Table 2
Number of Augusta Jury Trials[81]

Year	1745	1746	1747	1750	1751
Number of Trials	0	15	24	51(28)	27

The extraordinarily high number of jury trials in 1750 was anomalous for Augusta County, for nearly half of the trials (twenty-three) were actions brought by churchwardens to collect tobacco levies that supported the Anglican church.[82]

[78] *Id.* at 54.
[79] *See* ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, *supra* note 10, at 128 (Richmond County in the Northern Neck). Roeber's data for Essex and Charles City counties are more in keeping with my findings. *Id.*
[80] *See* Fairfax County, *supra* note 21, at Reel 37 (1750-52) and Reel 38 (1758).
[81] *See* Augusta County, *supra* note 23, at Reel 62 (1745-47 and 1750-51).
[82] *See id.*

If these cases are subtracted, the twenty-eight remaining jury trials are in keeping with the counts for 1747 and 1751. Moreover, the number held steady during the subsequent decade. In 1759 the court conducted seventeen jury trials despite the war that raged on the frontier, and the figure grew to twenty-seven juries in 1760.[83]

The seasons affected the courts' business. In the years 1750 and 1751 the Fairfax court met in quarterly sessions. Jury trials appear to have been limited to spring and summer, as shown in Table 3.

Table 3
Fairfax Juries at Quarterly Session, 1750 and 1751[84]

Month	1750 Number of Trials	1751 Number of Trials
March	14	3
June	28	0
September	0	0
December	0	0

In 1752 the court relented to popular pressure and met monthly.[85] Yet, over the course of the twelve monthly sessions, the court heard jury trials in only June (three trials), July (eight trials), and August (four trials). In 1758, the Fairfax court listened to fifty-two jury trials that were somewhat more widely distributed but clearly preponderated in spring and summer:

Table 4 (Table continued on next page)
Fairfax Juries at Monthly Sessions, 1758[86]

Month	Number of Trials
January	0
February	0
March	8
April	0
May	0
June	6
July	0
August	23
September	1
October	0

[83] *Id.* at Reel 63 (1759-1760). Virginia's frontier was constantly engulfed in violence during the war. *See* FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766 524-528 (2000).
[84] *See* Fairfax County, *supra* note 21, at Reel 37 (1750-1751).
[85] *Id.* (February 1752). On February 8, 1752 the court recorded a petition signed by "sundry of the inhabitants praying for monthly courts" and forwarded it to the General Assembly. *Id.*
[86] *Id.* at Reel 38 (1758).

November	2
December	4

In sum, forty-six of the fifty-two trials occurred between March and September.

The Augusta records reflect a similar clustering of jury trials in spring and summer, especially May through August, as shown in Table 5.

Table 5
Monthly Trials, Augusta County[87]

Year Month	1745	1746	1747	1750	1751	1759	1760
January	_	_	_	_	_	_	_
Feb.	_	_	2	2	13	_	_
March	_	_	2	12	_	2	_
April	_	_	_	_	_	_	_
May	_	_	6	16	9	6	9
June	_	_	1	_	_	_	_
July	_	_	_	_	_	_	_
August	_	3	3	20	_	9	12
Sept.	_	8	6	1	_	_	_
Oct.	_	_	_	_	_	_	_
Nov.	_	4	4	_	5	_	6
Dec.	_	_	_	_	_	_	_
-Total	0	15	24	51	27	17	27

The predominance of jury trials in spring and summer is not surprising. Travel was easier in the warmer weather. Witnesses and jurors were more likely to attend in these months than in fall when the harvest consumed their time and energy.

Moreover, the court undoubtedly weighed its own interests, not just the convenience of litigants, witnesses, and jurors. Jury trials were unpredictable, relatively time consuming, and occasionally disruptive. One could not foresee when trials would actually occur. The Fairfax order book looks like a rollercoaster as the annual count plunged from forty-two in 1750 to only three in 1751 before modestly ascending to fifteen in 1752.[88] Parties might suddenly settle or move for continuances. In any given session, no trials might occur one day and six the next. In its nine-day June 1750 session, for example, the Fairfax court conducted no jury trials on June 26, one each on the June 27-28, two each on June 29-30, none on July 2, four trials on July 3, five on July 4, and thirteen on the final day, July 5.[89] The pattern builds to an obvious crescendo, suggesting that justices deliberately pushed trials to the end of the session in the hope that

[87] *See* Augusta County, *supra* note 23, at Reel 62 (1745-47, 1750-51) and Reel 63 (1759-60).
[88] *See supra* text accompanying note 80 (Table 1).
[89] Fairfax County, *supra* note 21 at Reel 37 (June 1750).

cases might settle and to permit the court to plow through its other business in the meantime.

In sum, Virginians chose trial by jury at a rate that exceeds previous estimates. Court officials could not, however, predict when trials would occur, how many they might have to listen to in a session, or how long each one would last. Thus the order books suggest that when jury trials occurred, they were shaped by how the court conducted its other business. Put differently, both their frequency and randomness provide valuable insights into the nature of the colonial trial. Lay justices without formal legal training, like the laymen who sat on the juries, would have approached trials in much the same way that they handled the myriad other matters before the court. This is borne out by the types of cases tried and the results.

B. The Types of Trials

At common law, lawsuits were initiated under various "forms of action." The law demanded that litigants hammer their claims into one of these forms regardless of fit. The order book entries for Fairfax and Augusta counties yield a striking fact: the overwhelming majority of cases tried were of two types, debt actions and "assumpsit" actions (a species of "trespass on the case").[90] The simple forms swept within them a broad variety of claims that perhaps also simplified the courts' decision-making.

In a typical "debt" action, the plaintiff alleged that the defendant owed a fixed sum of money; the debt form was inappropriate where the sum owed remained uncertain or contingent ("unliquidated"). [91] Debt actions could be brought on either a "special" contract or a "simple" contract.[92] "Special" contracts were written agreements under formal seal, typically bonds, which Virginians frequently used as security to convey property, to loan money, or to ensure persons' appearance in court.[93] A "simple" contract was not under seal and in commercial practice took a variety of forms, such as bills of exchange, promissory notes, and oral agreements to do (or refrain from doing) something.[94] At common law a special contract (a bond) had to be pled as an action for debt.[95] Simple contracts could be enforced either through the debt action or as an assumpsit action.[96]

It is difficult to be sure why juries tried debt actions. Eighteenth-century courts did not produce transcripts of testimony, and the order books reflect only results, not the substance, of trials. Moreover, the nature of the debt action was

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[90] *Id.* The cases are grouped according to the clerk's entry in the order book because the pleadings are not available.

[91] My discussion of debt actions is taken largely from David Thomas Konig, *supra* note 13, at 111-15, and 5 THE PAPERS OF JOHN MARSHALL xxxiv (Charles F. Hobson, ed., University of North Carolina Press 1987).

[92] Konig, *supra* note 13, at 111-115.

[93] 5 THE PAPERS OF JOHN MARSHALL, *supra* note 91, at xxxiv.

[94] *Id.*

[95] *Id.*

[96] *Id.*

very straightforward: the plaintiff usually produced a sealed, written contract (e.g., a bond) that evidenced a debt and testified that he had not been paid.[97] Although the jury's role in such cases is not obvious, some clues emerge from order book entries describing special verdicts and allegations of error.[98] Bonds were frequently assigned to third parties, which raised complex questions about who could maintain the action and who was responsible for its payment decades after the bond was first drawn.[99] A jury trial for debt in 1750 offers a good example. According to the special verdict, Cornelius Elting sold the bond in question to Middleton Shaw in 1731.[100] Shaw later assigned the bond to the plaintiff, Captain John Colville, in 1732. (As luck would have it, Captain Colville happened to be a presiding magistrate in the Fairfax court.) The jury also found that a third party had attached the bond in 1733. The heart of the case apparently involved the bond's present value in 1750, which the jury set at twelve pounds "current money."[101]

Conceptually distinct from debt, the action for "trespass on the case" involved an injury caused indirectly and not through the use of "force."[102] Lawsuits on simple contracts were usually brought as a particular form of trespass on the case: an action for "assumpsit."[103] The plaintiff alleged that the defendant promised to do something – e.g., to pay a debt, to provide services of some kind - but failed to perform the act, thereby damaging the plaintiff. The focus was on the breached promise.

In both colonial Augusta and Fairfax counties, it appears that most actions captioned "trespass on the case" involved assumpsit. The clerk's entries frequently characterize the jury as finding that the defendant did (or did not) "assume" to pay or perform something of value.[104] Other "trespass" actions are specifically denominated as "assault and battery" or "slander."[105] The Fairfax court records for 1750 through 1752 reveal the number and type of actions tried to jury, as seen in Table 6.

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[97] *Id.* at 5: xxxiv-xxxv.

[98] "Special verdicts" are specific questions of fact or law given to the jury for their determination. Special verdicts are contrasted with "general verdicts," where the jury is asked only to rule for one party or the other. Allegations of error are parties' particularized objections to the judges' ruling on points of law. David Konig also has addressed why Virginians resorted to jury trials in debt cases. *Supra* note 13, at 114.

[99] *See id.*

[100] Fairfax County, *supra* note 21, at Reel 37 (3 April 1750).

[101] *See id.* The jury also assessed damages of one penny, a typical finding. The special verdict is cryptic, but it appears that Elting may have made payments to the party who attached the bond and claimed he had given Colville notice.

[102] *See* 5 THE PAPERS OF JOHN MARSHALL, *supra* note 91, at xxxv.

[103] *See id.* at xxxiv.

[104] The Augusta County order books do not use the term "assumpsit" in the captions; rather, the clerk captioned the litigation as "Trespass Case" or "Case" but described the jury's finding in terms of whether the defendant had "assumed" the obligation or undertaking at issue.

[105] *See, e.g.,* Fairfax County, *supra* note 21, at Reel 37 (4 July 1750).

Table 6
Fairfax Actions, 1750-1752[106]

Type	Number	Percentage
Debt	12	20%
Assumpsit	36[107]	60%
Slander	2	3%
Assault & Battery	3	5%
Detinue	1	1.6%
Scire Facias	1	1.6%
Unspecified	1	1.6%
Criminal	2	3%
- Total	60	—

Thus, 80% of jury trials (forty-eight out of sixty) involved debt or assumpsit.[108] By comparison, there are relatively few trials involving social misconduct. The court averaged just one trial per year for assault and battery and less than one trial annually for slander, which reflects a court preoccupied with commercial matters.

Nor was 1750-1752 anomalous. The Fairfax records for 1758 demonstrate essentially the same pattern, as shown in Table 7.

Table 7
Fairfax Actions, 1758[109]

Type	Number	Percentage
Debt	13	25%
Assumpsit	31	60%
Slander	0	—
Assault & Battery	5	9.6%
Detinue	0	—
Scire Facias	2	3.8%
Unspecified	0	—
Criminal	1	1.9%
- Total	52	—

[106] *See* Fairfax County, *supra* note 21, at Reel 37 (1750-52). The actions for "detinue" and "scire facias" also involved the recovery of property.

[107] The total includes one entry labeled simply "trespass." In light of the vast majority of assumpsit entries, and in the absence of anything suggesting that this lawsuit involved something different, it seemed reasonable to include this entry in the total. Trespass actions involving "assault and battery" or "slander" were specifically labeled as such by the clerk.

[108] This complicates the findings offered by David Konig, based on York County's records, wherein the writ of Debt was used in more than 60 percent of commercial actions. *See* Konig, *supra* note 13, at 113. It may be that Konig's Debt/Assumpsit ratio (6:4) holds for the type of action filed, but that different dynamics govern the number of jury trials based on such actions.

[109] *See* Fairfax County, *supra* note 21, at Reel 38 (1758).

Here again the vast majority of jury trials (85%) involved debt and assumpsit.

Despite its location on the frontier and its different social composition, the Augusta court tried the same kinds of cases as the Fairfax court. The Great Valley's population, exceedingly diverse compared to that of the tidewater, consisted of many Germans and Scots-Irish in addition to British immigrants and white native-born Virginians.[110] Augusta's jury trials for the years 1746 to 1751 are set forth in Table 8.

Table 8
Augusta Actions, 1746-1751[111]

Type	1746	1747	1750	1751	Total Percentage
Debt	5	13	34	10	53%
Assumpsit	6	10	6	8	25.6%
Slander	1	1	6	4	10.2%
Assault & Battery	0	—	3	1	3.4%
Detinue	0	—	—	2	1%
Scire Facias	0	—	—	—	—
Trover & Conversion	1	—	—	1	1%
Ejectment	1	—	—	—	0.08%
Unspecif'd	1	—	1	—	1%
Criminal	0	—	1	1	1%
- Total	15	24	51	27	117 Total Trials

Thus Augusta juries almost exclusively listened to actions sounding in debt or assumpsit. In no year studied was the percentage of such cases less than 66%. Indeed, in 1750 over 80% of the trials fell into these two categories, and in 1747 they comprised about 95% of the trials heard.

As with the Fairfax data, the percentages for Augusta County appear to hold throughout the decade of the 1750s. In 1759 and 1760, the Augusta court conducted a total of forty-four jury trials; nearly 82% (thirty-six of forty-four) were for debt and assumpsit, as seen in Table 9.

Table 9 (Table continued on next page)
Augusta Actions, 1759-1760[112]

Type	Number of Trials	Percentage
Debt	8	18%
Assumpsit	28	64%
Slander	4	9%

[110] *See* RISJORD, *supra* note 69, at 31-32.
[111] *See* Augusta County, *supra* note 23, at Reel 62 (1746-47 and 1750-51).
[112] *Id.* at Reel 63 (1759-60).

Assault & Battery	0	—
Detinue	2	4.5%
Scire Facias	2	4.5%
Trover& Conversion	0	—
Ejectment	0	—
Unspecified	0	—
Criminal	0	—
- Total	44	—

There is, however, a seemingly significant inversion between the frequency of debt and assumpsit trials. Although debt trials predominated assumpsit trials by a ratio of 2:1 for the period 1746-1751 (Table 8), by 1759-1760 the ratio is reversed, with assumpsit now out gaining debt roughly 3.5:1.[113] By 1759, then, Augusta's pattern resembled Fairfax's.

In summary, jury trials conducted in both Fairfax and Augusta courts almost always involved actions under the heading of debt or assumpsit. Nor is the trial docket extraordinary. The order books are filled with settlements, defaults, and bench trials involving the same two claims.

Why did debt and assumpsit predominate? To be sure, part of the reason is the limited number of forms available at common law, which severely restricted a party's options. More important, however, the courts themselves may have channeled an inordinate number of actions into these forms because they were familiar and easy to work with, even if so-called "debt" and "assumpsit" actions occasionally took on bizarre shapes. Nor is the pattern ascribable to a lack of technical legal knowledge; rather, institutional pressures, particularly a crowded docket of diverse business, might well explain the resort to these readily digestible forms of decision-making.

The vast preponderance of debt and assumpsit cases also reveals important clues about the courts' function in Virginia society where trade and exchange dominated the world inside and outside the courthouse doors.[114] The justices struggled to monitor an ever-increasing volume of commercial relations marked by self-interest and economic competition. Yet, while the cases reflect the litigants' material interests and profit motives, they also reveal the crudeness and unsophisticated nature of the market economy, especially on the frontier. In 1746, the Augusta court granted a default judgment in a debt case and ordered the attachment of the debtor's axe, water pail, three wooden bowls, and six pewter spoons.[115] On the frontier of a capital-scarce society, this modest list of items eloquently describes what was deemed valuable.

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[113] *See* Konig, *supra* note 13, at 111-15. This suggests that David Konig's data for York County, where debt actions clearly predominated, may not hold throughout Virginia, and that such trends may be localized or varies over time.

[114] *Id.* at 115. Based on York County data, where debt actions clearly outnumbered assumpsit actions, Konig concludes that Virginians harbored cultural attitudes toward "obligations" that differed from those that prevailed in Massachusetts.

[115] *See* Augusta County, *supra* note 23, at Reel 62 (November 21, 1746).

Fairfax verdicts reflected the tidewater economy. In the July 1750 session the court heard twenty-two jury trials, most of which involved actions for debt and assumpsit.[116] Damage awards came in two forms: those indexed in currency and those valued in pounds of tobacco.[117] The damage awards set in currency averaged just over eight pounds (identical to the Augusta sample).[118] In twice as many cases, however, the jury valued damages in pounds of tobacco, the average award being nearly 4,100 pounds of tobacco.[119] It seems likely, as will be seen, that the jury's primary function may have been to value debts in the prevailing currency, whether specie, paper money, or tobacco.

Not all cases involved market transactions. Some debt actions took on rather odd permutations because of the stilted nature of the common-law forms of action. In 1750, Augusta juries heard thirty-four debt cases.[120] Most, however, had nothing to do with trade, exchange, or market relations in any conventional sense.[121] A churchwarden (and justice of the peace) brought twenty-five "debt" actions against defendants who failed to provide lists of tithables.[122] Obedient juries assessed "damages" of 1,000 pounds of tobacco in nearly every case.[123] Nor were the Augusta court's innovations limited to the churchwarden cases. One defendant was found "guilty" of debt for "retailing liquor without a license"[124] and unsuccessfully protested that a "penal act" could not be tried as debt.[125]

Fairfax also had its oddities, such as a "debt" case involving the illegal sale of peach brandy.[126] Unsure of the law, a jury returned a special verdict finding that in 1750 the defendant's wife, in his absence, sold a neighbor three and one-half pints of peach brandy.[127] It also found that the defendant had made the brandy but did not have a license to keep an ordinary.[128] The jury awarded paltry damages of one pound of tobacco and valued the "debt" at 2,000 pounds of tobacco.[129]

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[116] *See* Fairfax County, *supra* note 21, at Reel 37 (3-5 July 1750).
[117] *Id.*
[118] *Id.*
[119] *See id.* Seven awards were made in currency, which ranged from five pounds, one shilling to twenty pounds. Juries awarded damages valued in tobacco in thirteen cases. *Id.* Several relatively high awards skew the average. The awards ranged from 18,000 to 1,084 pounds of tobacco. *Id.*
[120] *See* Augusta County, *supra* note 23, at Reel 62.
[121] *Id.*
[122] *Id.*
[123] *Id.* Twenty-two of twenty-five cases resulted in 1,000 pounds (tobacco) awards (one award was assessed at 4,000 pounds). In two cases juries could not reach verdicts. *See also infra* text accompanying note 185.
[124] *See* Augusta County, *supra* note 23, at Reel 62 (June 1751).
[125] *Id.*
[126] Fairfax County, *supra* note 21, at Reel 37 (22 August 1752).
[127] *Id.*
[128] *Id.*
[129] *Id.* It is unclear who the plaintiff was or why he brought the action. Most likely, he was a churchwarden and the lawsuit's proceeds went to the local parish.

It is manifestly unclear how the common-law debt action subsumed a failure to report tithables or the illegal sale of liquor.[130] The surviving records invite only speculation, but they complicate David Konig's prescient findings about Virginians' cultural attitudes toward obligations based on types of writs (Debt or Assumpsit).[131] The easiest but least satisfactory explanation is that an unschooled bench and bar simply knew no better; ignorance bred simplicity. There is a point, however, where ignorance shades into creativity.

The common law of pleading was a far-from-perfect system that jammed disputes into ill-fitting forms dictated by ancient writs. Formulated to serve a largely static agrarian society, the writs were poorly suited for the demands of a growing commercial economy in Britain and North America.[132] As Virginia's magistrates, juries, and parties confronted a random array of duties that blended judicial, legislative, and executive decision-making, they were interested less in technical legal precision than in reaching relatively quick and effective resolutions to the myriad issues they confronted.[133] By distilling cases into a few readily understandable and frequently encountered forms, litigants simplified the courts' tasks.[134]

C. Results of Trials

In modern courtroom parlance, colonial Virginia was a "plaintiff's paradise."[135] Juries overwhelmingly favored plaintiffs in nearly every category of lawsuits, including the assumpsit and debt actions that dominated the dockets. Two conclusions emerge from the data. First, there is no evidence of a struggle between "pro-market" and "anti-market" interests, at least not within the courthouse. Any "transition" to capitalism occurred in Virginia long before the mid-eighteenth century.[136] To be sure tension and conflict pervaded the courts, but this is, after all, their function. Contention swirled around the merits of individual cases; consensus marked the court's embrace of commercial values and the importance of enforcing obligations.[137] This raises, however, an important and nagging question. If there was such widespread consensus over market relations, why were so many cases tried to jury? My second, and admittedly more speculative, conclusion is that jury trials may have played a unique and as-yet unrecognized function as a "currency exchange" of sorts. Put

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[130] *See* ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 65, 74 (University of Chicago Press 1930). Scott contends that Virginia created statutory "debt" actions, which substituted for prosecution by information. *Id.* Such actions were used in cases of hog stealing and illegal liquor sales. *Id.* Although Scott asserts that such actions were "long known" to English law, he cites no authority. *See id.*

[131] *See* Konig, *supra* note 13, at 115.

[132] *See id.*

[133] *See* Blinka, *supra* note 62 at 91-92, 98.

[134] *Id.*

[135] The data support observations by Murrin and Roeber, *supra* note 77, at 124.

[136] *See* Konig, *supra* note 13, at 114; *see also* Richard Bushman, *Markets and Composite Farms in Early America,* 55 WM. & MARY QUARTERLY, 3d ser., 351-374 (1998).

[137] *See* Konig, *supra* note 13.

differently, undoubtedly many litigants battled over technical issues including the written debt's authenticity and prior payments, yet the jury's primary service was to place a current value on old debts in a credit-barren economy marked by fluctuating currency.

One suspects that a frontier society, like Augusta County, might have been a bit more hospitable towards debtors. Leniency did not, however, manifest itself in liability verdicts favoring defendants. Table 10 describes the overwhelming success plaintiffs enjoyed in debt and assumpsit actions during 1746 and 1747, the court's earliest years.[138]

Table 10
Augusta Verdicts, 1746-1747[139]

Type	Plaintiff's Verdicts	Defense Verdicts	Other(Special Verdicts or Mistrials)
Debt	13	3	2[140]
Assumpsit	14[141]	2	—
Total	27	5	2

- The same pattern holds for 1750 and 1751 as seen in Table 11.[142] For convenience, the "church warden" debt actions (CW) are set apart from the more conventional (one assumes) debt cases, but the result is still the same.

Table 11
Augusta Verdicts, 1750-1751[143]

Type	Plaintiff's Verdict	Defense Verdict	Other (Special Verdict, Mistrial)
Debt	18	0	1[144]
Debt (CW)	23	0	2[145]
Assumpsit	9	4[146]	1
Total	50	4	4

[138] *See* Table 10, *infra* text accompanying note 139.
[139] *See* Augusta County, *supra* note 23, at Reel 62 (1746-47).
[140] One case resulted in a mistrial (possibly a hung jury). In the other the jury returned a special verdict that seemed to favor the plaintiff but ultimately turned on a question of law, which was left to the justices. *Id.*
[141] In two cases the court intervened and set aside the verdict. In one the justices granted a judgment for the defendant notwithstanding the verdict, and in the other they awarded a new trial. *Id.*
[142] *See* Table 11, *infra* text accompanying note 143.
[143] *See* Augusta County, *supra* note 23, at Reel 62 (1750-51).
[144] The court set aside a plaintiff's verdict. *See id.*
[145] One jury was unable to reach a verdict. *See id.* In another case, the court granted a new trial because the jury did not return a damage award. *See id.*
[146] In 1751 defendants and plaintiffs dueled to a near draw. Juries returned four plaintiffs' verdicts but also returned three defense verdicts and failed to reach a verdict in a fourth case. *See id.* By contrast, plaintiffs prevailed in five of six assumpsit trials in 1750.

Nor did the disruptions of the French and Indian War break the pattern, as Table 12 demonstrates.

Table 12
Augusta Verdicts, 1759-1760[147]

Type	Plaintiff's Verdict	Defense Verdict	Other (Special Verdict or Mistrial)
Debt	5	3	—
Assumpsit	21	6	1
Total	26	9	1

At first blush it seems noteworthy that defendants won 37% of the debt actions (three of eight cases) in 1759 and 1760.[148] Two of the defense verdicts, however, involved rather odd permutations of "debt": selling liquor without a license.[149]

The data from Fairfax County tracks the same pattern. Plaintiffs prevailed in over 85% of the trials for debt and assumpsit in the early 1750s, as shown in Table 13.[150]

Table 13[151]
Fairfax Verdicts, 1750-1752

Type	Plaintiffs' Verdicts	Defense Verdicts	Other (Special Verdicts or Mistrials)
Debt	11	1	—
Assumpsit	29	4	2
Total	40	5	2

And again the pattern held through the tumult of the 1750s and the disruptions of war. Table 14 reflects that plaintiffs prevailed in over 88% of jury trials in 1758.[152]

Table 14
Fairfax Verdicts, 1758[153]

Type	Plaintiff's Verdicts	Defense Verdicts	Other (Special Verdicts or Mistrials)
Debt	13	0	—
Assumpsit	26	2	3
Total	39	2	3

[147] *See* Augusta County, *supra* note 23, at Reel 63 (1759-60).
[148] *See* Table 12, *supra* text accompanying note 147.
[149] *See* Augusta County, *supra* note 23, at Reel 63 (1759-60).
[150] *See* Table 13, *infra* text accompanying note 151.
[151] *See* Fairfax County, *supra* note 21, at Reel 37 (1750-52).
[152] *See* Table 14, *infra* text accompanying note 153.
[153] *See* Fairfax County, *supra* note 21, at Reel 38 (1758).

What role, then, did juries play in these trials? Were they simply ciphers for plaintiffs who overwhelmed recalcitrant debtors after the hollow formality of a brief jury trial? Did they serve simply to record debt judgments? Again, the paucity of records cautions against overly confident answers, yet the order books and commercial practices yield several clues. Forged paper always posed a risk, yet even "genuine" bills of exchange posed problems.[154] When issuing a bill of exchange, the drawer normally gave the payer (its purchaser) several copies.[155] The payer separately mailed each copy to the payee, who was to present one of them to the drawee.[156] Payment on any one copy canceled the debt.[157] As suggested earlier by Captain Colville's case, parties may have contested that they in fact owed no debt or disputed the note's terms. Other defenses were more technical, suggesting that pinched debtors seized upon any colorable argument to escape payment. The parties' claims of error offer some clues. One losing defendant in a debt action, for example, argued that the verdict should have favored him, not the plaintiff, because of technical variances between the bond's terms and the declarations in the pleadings. The debtor even complained that the bond and declaration named one "Bob Craven" (the plaintiff) whereas the writ named "Robert Craven."[158]

In other, perhaps most, cases, however, the jury may have served to place a current value on the debt. Historian John J. McCusker observes the value of bills of exchange depended upon ephemerals such as the drawer's and drawee's commercial reputations and, most important, local market conditions.[159] Court records strongly suggest that a trial functioned as a currency exchange, translating debts incurred years earlier into prevailing amounts of tobacco or local money. This is starkly apparent in Augusta County, where Virginians lived among the Scots-Irish and Germans who had pushed south into the Valley from Pennsylvania.[160] Augusta juries valued debts in both Virginia and Pennsylvania

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[154] JOHN J. MCCUSKER, MONEY AND EXCHANGE IN EUROPE AND AMERICA, 1600-1700 20-22 (1978) (describing commercial practices involving bills of exchange).
[155] *See id.*
[156] *See id.*
[157] *Id.*
[158] *See* Augusta County, *supra* note 23, at Reel 62 (1 March 1750/51). Other errors related to the date of return and facial differences between the bond's terms and its description in the declaration (the pleading). For example, the defendant's final error alleged that the declaration set forth a bond for L.37, 1 s., 18d. in Pennsylvania money, whereas the bond produced in court stated a debt for L.74, 1s., 4d., an inconsistency that raised questions about whether the declaration "intended" a different bond. The court rejected the claimed errors at the June term. *Id.* (1 June 1751).
[159] *See* McCusker, *supra* note 154, at 22. *See also* Konig, *supra* note 13, at 111, who underscores Virginia's peculiar problem with an appreciating currency that resulted in debtors repaying obligations in "overvalued" money (emphasis original). The answer to the mystery about why debt actions were tried to jury may have had less to do with "damages" or technical objections and more to do with placing a present value on a past debt. The point merits further, more extensive analysis. Jury verdicts should be compared to settlements and other indicia of currency values that might be gleaned from newspapers and commercial transactions (e.g., contemporaneous bonds).
[160] *See* RISJORD, *supra* note 69, at 31-32.

currency.[161] For example, in one debt case the jury set damages at one penny (a typical determination) and then valued the debt at 37 pounds Pennsylvania money and 27 pounds, 15 shillings, Virginia currency.[162]

In summary, Augusta's and Fairfax's juries were not "pro-debtor" in the obvious sense. The findings qualify other studies arguing that Southern juries harbored an anti-commercial animus.[163] Verdicts overwhelmingly favored plaintiffs who sued to collect on debts and other obligations. An "anti-capitalist" or "pre-commercial" ethos is not readily apparent.[164] Jurors' knowledge of local economic conditions, the character of those involved in the lawsuit, and the community's sense of fairness all factored into their assessment.

V. COLONIAL TRIALS AND INSTITUTIONALIZED DEFERENCE

Commerce pervaded pre-Revolutionary Virginia, but the Old Dominion was far from an atomized welter of competing, self-interested, acquisitive individuals. Notions of hierarchy and deference competed with an emergent liberalism that endorsed individuals' opportunity to leap ahead of others on the social ladder based on wits, wiles, and good fortune.[165]

Courts are an excellent yardstick of a society's commitment to deference and hierarchy. Highly organized and meticulously structured, courts embody the idea of rank order, mutual respect, and obedience to (higher) authority.[166] The courthouse's architecture literally placed people according to their role and authority (and still does).[167] Only lawyers and justices crossed the "bar."[168] Parties and witnesses did so only when called to play their roles.[169] Trial procedures reflect similar ordering. Witnesses spoke only when permitted by the

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[161] *See* Augusta County, *supra* note 23, at Reel 62 (May 1750).

[162] *See id.* For a series of such judgments, *see also id.* (Feb. 1751). It appears that Virginia juries discounted Pennsylvania money at a rate of about 25%. *See id.*

[163] For scholarship positing an anti-commercial mindset among juries, see FORREST MCDONALD, NOVUS ORDO SECLORUM 115 (1985); *see also* MILLER, *supra* note 10. Konig found no animus against commerce or legal debts. Konig, *supra* note 13, at 114. One study discerned a close connection between lending and litigation in antebellum South Carolina. *See* THOMAS D. RUSSELL, THE ANTEBELLUM COURTHOUSE AS CREDITORS' DOMAIN: TRIAL-COURT ACTIVITY IN SOUTH CAROLINA AND THE CONCOMITANCE OF LENDING AND LITIGATION, XL AM J. LEGAL HIST. 331 (1996) Russell found that creditors did not resort to courts only after failed collection attempts; rather, litigation occurred contemporaneously to the economic transaction. *Id.* at 360. Russell did not examine colonial or early national records, but his conclusions caution against viewing litigation solely in terms of frustrated creditors seeking to collect from dead-beat debtors. *See id.*

[164] For the view that the "transition" to capitalism must be analyzed more broadly than "the conventional identification of capitalism with a free-enterprise market economy," *see* Michael Merrill, *Putting `Capitalism' in Its Place: A Review of Recent Literature*, 52 WM. & MARY Q., 3d Ser., 315, 317 (1995).

[165] ISAAC, *supra* note 56; *see also* Merrill, *supra* note 164 at 317.

[166] *See* Isaac, *supra* note 56, at 88-94.

[167] *See infra* text accompanying notes 189-193.

[168] *Id.*

[169] *Id.*

justices or questioned by attorneys, who normally addressed the court in saccharine tones of respect (even if feigned).[170] The justices addressed each other with similar humility and deference.[171] When George Mason resigned his commission on the Fairfax court because of advancing age and declining health, he directed his plaintive letter to the "worshipful court."[172] In short, rituals of deference and hierarchy permeated the courthouse, the law, and legal culture.

We must distinguish, however, between the worlds inside and outside the courthouse. Inside, the gentry could more easily control the environment and establish a climate that nurtured deference and hierarchy. The courthouse's close confines and the magistrates' legal powers normally assured that those asking for favors or relief would be respectful and attentive. Outside, the gentry's grip was far more tenuous. For example, religious dissenters consistently challenged the gentry's authority in the decades before the Revolution.[173]

Occasionally, deference was contested inside the courthouse as well. The court was, after all, an institutional magnet that attracted strife and discord. Restless Virginians struggled with one another in a market economy that frequently misfired, causing distress and dislocation. Indeed, magistrates themselves were deeply enmeshed in commerce and speculation. When disputes could not be settled amicably, parties tossed them into courts that strained to channel conflict and promote an orderly, relatively noncontentious, and authoritative resolution. Occasionally, frustrated litigants lashed out at the bench, which then defended itself. For "damning the court," one contemnor suffered a fine and time in the stocks. [174] Resistance also took institutionalized form, as when Augusta's grand juries presented justices for minor offenses such as profane swearing.[175] Sometimes presentments assumed more ominous proportions, as in November 1752 when a Fairfax grand jury presented the presiding justice, Colonel John Colville, for living in fornication with Mary Carney.[176]

Normally, justices reacted with seeming disdain; the bench later discarded most charges. Hence, in December 1752 the Fairfax court dismissed the fornication charge against Colonel Colville, the only presentment dismissed that session.[177] To modern sensibilities such dismissals appear to be brazen affronts

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[170] *See infra* text accompanying notes 243-247.

[171] *See* Isaac, *supra* note 56, at 88-94.

[172] *See supra* note 21.

[173] *See* ISAAC *supra* note 56, at 161, 243. In his study of the Williamsburg courthouse, Konig concludes that the "extent of gentry participation and domination has been considerably exaggerated." *See* Konig, *supra* note 61, at 25.

[174] *See* Augusta County, *supra* note 23, at Reel 62 (May 1746) (the court fined the contemnor, Howard Boyle, 20 shillings and placed him in the stocks for 2 hours).

[175] *Id.* at p. 331 (swearing).

[176] *See* Fairfax County, *supra* note 21, at Reel 37 (22 November 1752). Colville was an active justice who presided over the court that same session and even recorded the day's entries in his own hand. Nor was this the only time that a jury took Colville to task. Earlier that same year a trial jury found against Colville in an assumpsit action and ordered him to pay over a thousand pounds in tobacco to the plaintiff. *Id.* (23 July 1752).

[177] *Id.* (19 December 1752). Other defendants were fined for their transgressions.

to the rule of law and mark an unprincipled court protecting its own members. But the fact of presentment was itself significant, representing the grand jury's public rebuke, delivered in open court before the throng assembled for court day: the presentment was the punishment. In sum, while the courtroom embodied a stable, rank-ordered society, tension was present.

Occasionally the justices themselves prodded the grand jury to use its powers of rebuke and disapprobation. Thus, three justices persuaded an Augusta grand jury to present "the courthouse" as "not sufficient" for the county's needs, a seemingly empty gesture that nonetheless underscored the symbolic power of presentment.[178]

This example also illustrates that "resistance" did not always flow from bottom to top. The gentry occasionally breached its own decorum. In 1746 the Augusta County court "convicted" Gentleman Gabriel Jones, a presiding justice, of a misdemeanor for interrupting a witness while he testified. Apparently Jones lost his temper and threatened to arrest the witness for reasons forever buried.[179] Later that same year the court fined Gentleman William Russell, a lawyer, five shillings for his "contempt and misbehavior." Again the circumstances have vanished, but Russell had represented William Beverly in a jury trial for ejectment earlier that day. The jury had found against Russell's client, and a bad day turned worse when the court overruled his objections.[180] Perhaps Russell's disappointment bubbled into a foul mood that he later vented, to his regret.

Rank-order and deference to one's betters are difficult goals to achieve even in the relatively small confines of the courthouse. Yet the resistance and defiance one observes is relatively infrequent and episodic. Considering that the courthouse was a forum designated for conflict, the order books reveal the relatively harmonious interaction of like-minded people. It is hardly surprising that the court's crowded docket occasionally yielded brief outbursts or gave rise to personality conflicts among those working together in its cramped confines. Those who actively participated as justices, attorneys, litigants, witnesses, and jurors shared a broad consensus about society and the law. Juries reached quick verdicts that favored plaintiffs in the vast majority of debt and assumpsit cases. In short, the records reflect a place of accommodation and cooperation.[181]

Justices had the authority and inclination to impose their will on the lesser types who sat on juries, as was occasionally demonstrated when justices appeared in their own courts as litigants with a personal stake in the verdict. For the most part, juries sided with the litigant-justices. When juries went their own way, however, the presiding justices occasionally intervened to aid their colleague by granting a new trial or otherwise overriding the jury's will. These patterns are evident in the Augusta churchwarden cases.

The gentry magnified its influence within the community by linking control over both the local vestry and the judicial machinery. Of the thirty-four debt

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[178] *See* Augusta County, *supra* note 23, at Reel 62, p. 331.
[179] *Id.* (August 1746).
[180] *Id.* (November 22, 1746).
[181] *See* Konig, *supra* note 61, at 25.

actions decided by juries in Augusta County during 1750, nearly three-quarters (twenty-five of thirty-four) were initiated by a plaintiff who was both a churchwarden and gentleman of the commission.[182] Why the actions were brought as "debt" is unclear.[183] Certainly, some may have involved persons who welshed on their obligations to the parish.[184] Most, however, involved defendants who failed to provide the vestry with a list of tithables.

The churchwarden cases nonetheless impressively illustrate the justices' influence over juries. Nearly every case carried the same result: a finding in the plaintiff's favor and an order that the defendant pay 1,000 pounds of tobacco and one penny in damages. In one case the jury valued the "debt" at 4,000 pounds.[185] During the May 1750 session, however, juries bucked the justices in two instances, but the former's independence proved short-lived. One defendant's claim that he owed the vestry only eighty pounds of tobacco resulted in a hung jury. The court immediately substituted six new jurors, retried the matter that same day, and accepted a plaintiff's verdict for 1,000 pounds of tobacco. One can reasonably assume that the displaced jurors supported the defendant while the new jurors favored the bench. In another trial that very day, a jury returned from its deliberations unable or unwilling to find damages in the churchwarden's favor. Upon a motion by the churchwarden's attorney, the court ordered the jury "to retire and find some damages" but again they soon returned without a decision and the court ordered a new trial. During its next session in August the magistrates heard fifteen more churchwarden cases and appeared to have solved the problem of wayward jurors. On a single day the court conducted eleven trials using two jury panels that rotated between cases. Nearly all (ten of eleven) resulted in identical 1,000-pound (tobacco) verdicts in the churchwarden's favor.[186]

This sequence of events, then, raises serious questions about justices' ability and inclination to cajole juries or manipulate outcomes. More important, it provokes discussion of how pre-Revolutionary Virginians understood the "trial."[187]

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[182] Augusta County, *supra* note 23, at Reel 62 (1750). The cases are scattered among the March, May, and August sessions. None were observed in 1751. *See* ISAAC, *supra* note 56, at 131-35, which discusses the gentry's social authority and its institutional manifestation in the county courts and parish vestries.

[183] *See* SCOTT, *supra* note 130, setting forth Scott's surmise about the origin of Virginia's "penal debt" actions.

[184] *See* Augusta County, *supra* note 23, at Reel 62 (March 1749/50) (debt for six pence).

[185] *Id.* (August 31, 1750).

[186] Augusta County, *supra* note 23, at Reel 62 (May and August 1750). The eleventh resulted in an award of 4,000 pounds. The August churchwarden trials are also discussed below in connection with jury composition. It also appears that some magistrates profited along with the local parish. Gentlemen Peter Scholl, the plaintiff, received witness fees for all churchwarden cases heard that day. *See also infra* note 223.

[187] The characteristics of the old-style trial were evident after the Revolution in both Virginia's county courts and the newly created federal courts. *See* Blinka, *supra* note 62, at 263-392.

VI. THE ANATOMY OF COLONIAL TRIALS

Trials in colonial Virginia were the institutional embodiment of deference and hierarchy. The physical layout of the courtroom carefully placed people according to their rank and role. Eighteenth-century trials also rested on an epistemology vastly different from those underpinning modern trials. Juries were expected to be knowledgeable about local events and people. Most important, the trial's primary objective was not the chimerical reconstruction of a past moment. These characteristics and others are best discerned by discussing the main features of a colonial trial.

A. The Physical Space: Separating Those Who Act From Those Who Watch

Courtrooms are designed to put people in their places – quite literally. A courtroom's architecture reflects a great deal about the conduct and purpose of trials and their role in society. A prominent feature in the colonial landscape and the foci of local power, the courthouse's exterior reflected its central role in Virginia's society. Rhys Isaac observes that they were "usually an isolated brick structure with a simple round-ordered, loggia-style porch on the front."[188] Punishing lawbreakers, granting licenses, and awarding judgments reminded Virginians that its power was concrete as well as symbolic.[189]

More telling than the use of brick or columns to adorn the building's exterior was the layout of the courtroom itself, a floor plan that persists to this day. The raised curvilinear bench was its most prominent feature, the judges' elevated position a vivid reminder of the courts' power.[190] The judges looked down from above; all others were forced to look upwards. Juries did not always have a specially designated space, perhaps because their role was more occasional than that of the justices. In some courthouses, however, the jury sat in a curvilinear "barr" immediately in front of, but below, the magistrates.[191] Witnesses stood alone at a particular location, where judges and jury could closely scrutinize them. The attorneys sat at tables or on benches designated for plaintiffs or defendants. The "bar," a low wall, sometimes separated bystanders from those

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[188] *See* ISAAC, *supra* note 56, at 88.

[189] *Id.* at 93-94. *See also* ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS, *supra* note 10, at chapter 3.

[190] JOHN O. PETERS & MARGARET T. PETERS, VIRGINIA'S HISTORIC COURTHOUSES 12 (1995). *See* ISAAC, *supra* note 56, at 91. For a provocative discussion of how courthouse interiors served notions of deference and hierarchy, *see* Carl Lounsbury, *The Structure of Justice: The Courthouses of Colonial Virginia*, *in* PERSPECTIVES IN VERNACULAR ARCHITECTURE, vol. III, ch. 18 (Vernacular Architecture Forum 1982). I owe the reference to Professor Ann Smart Martin, University of Wisconsin – Madison.

[191] Peters & Peters, *supra* note 190, at 22 (describing the 1691 courthouse in what is now Aquaintanocke County, where the builder was instructed to "'Raise the Courts plattforme two Foote above the Floor and the Jurys Barr one Foote all which to be decently Railed and Banistered in.'"). Not all courts, however, had "jury boxes" or even designated rooms for jury deliberations. Konig's description of the Williamsburg courthouse omits any reference to a dedicated jury space of any sort. *See* Konig, *supra* note 61, at 2-5, 17.

who actively participated in the court's business.[192] Put differently, it distinguished those with power and authority from those who watched. Attorneys and judges were privileged to cross the bar. Others – parties, witnesses and jurors - had to be specially called.

In sum, courtrooms were carefully laid out with an eye to power and function.[193] Functionally, they were designed to identify easily the parties and to allow judges and jurors to hear witnesses and arguments. Symbolically, the courtroom reminded all assembled of their station within its walls.

B. Jury Composition

Jury service broadened the community's participation in the courts' affairs and official decision-making. Jurors embodied the community's collective knowledge of past events, persons, and local customs. Moreover, the courthouse doors swung both ways. Jurors brought their common knowledge and left instructed. Having witnessed the court's activities, they imparted the lessons learned to their community.[194]

Not all were eligible for jury service. Women, children, Indians, and slaves were excluded by status.[195] White males had to meet the measure of property and standing, at least in theory. Moreover, in composing Virginia's various juries, the law explicitly calibrated social standing and material wealth with power and authority. In the General Court, grand jurors had to be "freeholders" who were "capable" of identifying serious criminal offenders. Its trial jurors had to be freeholders or individuals worth over 100 pounds current money.[196] More modest standards applied to the county courts, where jurors had to be freeholders or possess a "visible estate, real or personal, of the value of fifty pounds at least."[197]

Although often overlooked, vicinage requirements for jury service yield important insights about the jury's function. The vicinage (in practice, the county) described the "vicinity" near which the event occurred. Ideally, the jury consisted of at least some propertied men familiar with the events, persons, or customs pertinent to the case. Hence, the General Court summoned trial jurors from the county where the crime occurred, although bystanders frequently made up the inevitable shortfall. County court jurors were, of course, drawn from the locality. Taken together the vicinage and property-holding requirements assured

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[192] It is not clear that all courthouses had a "bar" in the sense of a low wall. Sometimes the "barr" refers to the elevated platform dedicated to the judges or jurors, as in the previous note. It appears that the Williamsburg courthouse had a gated bar that separated onlookers from court officials and litigants. First Floor Plan of 1770 (Conjectural) (Colonial Williamsburg Foundation, undated) (on file with author).

[193] *See* Lounsbury, *supra* note 190, at 223.

[194] *See* ISAAC, *supra* note 56, at 91-92.

[195] *See* GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 196 (1736; reprint, William W. Gaunt & Sons 1969).

[196] HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 81, 92 (University Press of Virginia 1965). *See also* WEBB, *supra* note 195, at 195-96.

[197] *See The Statutes at Large*, *supra* note 22, at 5: 525-26.

that jurors were familiar with local customs and their neighbors. Following their service, jurors returned home and described their experiences to family and friends.

When insufficient numbers of specially summoned jurors failed to appear, Virginia's courts relied heavily on "bystanders" to complete juries. Bystanders simply happened to be nearby when the sheriff needed more bodies; they could be curious onlookers, witnesses summoned on other cases, or litigants waiting for their own causes to be heard. Technically, the property qualifications applied to bystanders, but the law made it extraordinarily difficult to challenge jurors on this ground: unless the party objected before the jury was sworn, the error was waived.[198] It is impossible to reconstruct the extent to which courts relied on bystanders. Without venire lists naming the persons originally summoned for jury service, there is no certain way of knowing whether jurors listed in order books were bystanders.[199] Occasionally the court held reluctant or lazy jurors in contempt for failing to appear, but the references are scattered and exceptional.[200] One suspects that sheriffs, with the courts' blessing, often dispensed with jury summonses because the time, effort, and expense yielded paltry returns. By 1738 the General Court relied almost exclusively on bystanders.[201] In 1748 the General Assembly legitimized bystanders as the norm for all trials in the General Court and county courts. On trial days, sheriffs were required to "summon a sufficient number of the bystanders" so that courts could impanel "sufficient juries."[202]

Reliance on bystanders eased the burden of impaneling juries. More fundamentally the use of bystanders helped assure that juries were knowledgeable about the court's business. Court day may have swept in its share of idlers and miscreants, but it more naturally attracted men actively involved in local social and economic life. Present at court to file lawsuits, record deeds, or have their own case called, they probably welcomed the opportunity to sit on a jury and collect a fee.[203]

The records reveal that courts frequently used the same panels to decide a series of lawsuits, often on the same day.[204] Each case was fully heard to verdict

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[198] *Id.* at 5: 526.

[199] In both Fairfax and Augusta counties the order books list the names of all jurors who heard each trial. No venire lists appear in the order books. A venire is the panel from which trial jurors are drawn.

[200] *See* Fairfax County, *supra* note 21, at Reel 37 (26 September 1750), where the court ordered six men to show cause why they should not be held in contempt for failing to appear for grand jury duty. This is one of very few entries that relate to recalcitrant jurors of any sort.

[201] *See* Rankin, *supra* note 196, at 92.

[202] *See The Statutes at Large*, *supra* note 22, at 5: 525.

[203] *See* 5 THE PAPERS OF JOHN MARSHALL, *supra* note 91, at xlv (discussing St. George Tucker's complaint in the early 1800s that "idle," dissolute men packed the jury for purposes of having their "expenses" paid).

[204] I used random sampling in both Augusta and Fairfax counties. For Augusta, see, e.g., Augusta County, *supra* note 23, at Reel 62 (September 1746); August 31, 1750 (two jury panels alternated among eleven cases). For Fairfax, *see, e.g.*, Fairfax County, *supra* note 21, at Reel 37 (March 30,

before the next case was called. One surmises that on days when the court heard five or more jury trials, the cases must have been relatively brief, lasting minutes not hours.[205] In sum, there is no evidence that Virginia adopted the earlier British practice of allowing a single jury to hear evidence on six cases in serial fashion, for example, and then retire and deliberate on all six.[206]

Even more common than repeated use of the same jury are instances in which a core number of jurors heard a series of cases throughout a day: fractions of eleven of twelve or nine of twelve are common.[207] An example from one Augusta court day in September 1746 illustrates the continuity. The court heard seven trials with the following jury compositions:[208]

> Trials 1 and 2: same panel.
> Trials 3 and 4: a substantially new panel heard both cases, but two jurors remained from trials 1 and 2.
> Trials 5 and 6: eleven jurors from trials 3 and 4; one new juror.
> Trial 7: seven jurors from trials 3 - 6; five new jurors.[209]

Most jurors were neither "idle" spectators nor champions of selfless civic service. On that same September day in Augusta, James Armstrong served as a juror in trials 3 and 6 before appearing as the plaintiff in trial 7.[210] Apparently, the substitution of five different jurors did not bode well: Armstrong lost.[211] Nor was Armstrong's dual role atypical. Samuel Lockhard served as juror in three trials earlier that day before assuming the role of defendant in the day's eighth and final trial (he won).[212] Other jurors appeared as witnesses. For example, in November 1746 Robert Christian was the foreman on the day's first jury trial, a witness in the second (which the jury decided for the opponent), and then substituted for Juror William Hall on the day's third jury trial. Just before the

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1750) (same jury, two trials); April 3, 1750 (same jury, two trials), July 4, 1750 (same jury, two trials), July 5, 1750 (same jury, three trials with just one juror substituted).

[205] *See* BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5, at 376. Beattie reports that some British criminal trials may have lasted "a few minutes."

[206] *Id.* at 395. English jurors complained that serial trials made it difficult to recall the evidence in the particular cases. The practice was virtually abandoned in the London criminal courts by 1738. *Id.* at 395-96.

[207] *See, e.g.,* Augusta County, *supra* note 23, at Reel 62 (November 1746) (11 of 12), February 1749/50 (11 of 12), March 1749/50 (9 of 12), and May 22, 1750 (6 of 12). *See, e.g.,* Fairfax County, *supra* note 21, at Reel 37 (July 5, 1750) (11 of 12); June 23, 1750 (eight of twelve jurors heard the first two trials and all jurors from the second trial decided three more trials that same day).

[208] The court heard eight jury trials that day but I recorded jurors' names for the first seven only. The cause in the eighth trial was not listed in the order book; however, this case resulted in the only hung jury of the day. The defendant, who presumably benefited by the hung jury, was Samuel Lockhard, who was a juror in trials 3,4, and 7.

[209] *See* Augusta County, *supra* note 23, at Reel 62 (September 1746).

[210] *Id.*

[211] *Id.* Although I did not perform a statistical analysis, there is no obvious correlation between one's role as a litigant and how one voted on a jury. For example, a jury decided against the defendant in an action for trespass on the case. The defendant appeared as a juror in the very next trial and voted for the plaintiff. *See id.* (May 1747).

[212] *Id.*

third jury trial commenced, Hall had won a bench trial in a debt action and was apparently done for the day. Juror Hall, obviously, opted not to trust his dispute to "the country."[213]

A few appeared to relish their role as juror. James Trimble was the foreman of six juries on a single day in Augusta County.[214] Harry Boggess merited the "iron-juror" award for Fairfax County by sitting on all thirteen jury trials held on July 5, 1750.[215]

The tedium of the order books occasionally provides clues to how court service might spell preferment. Benjamin Borden acknowledged a deed in the Augusta court in November 1746.[216] A year later his name appears as a juror, and by February 1749/50 Borden held a commission as a justice of the peace.[217] Fairfax yielded its own success stories. Hugh West, Jr., admitted to the Fairfax bar on March 26, 1751, obliged the court a week later by serving as the foreperson of a jury![218] By year's end West had been named to the Fairfax commission.[219]

Repeated jury service by courthouse regulars helped forge consensus. Unlike other colonial courts, Virginia's judges lacked the power to comment on the evidence or instruct the jury about the law.[220] This hardly left the magistrates bereft of influence. No doubt they communicated their beliefs through gestures, facial expressions, and "off-the-record" comments. And occasionally judges played an even more direct role. One Fairfax justice, Gerrard Alexander, appeared as the foreperson of a grand jury in May 1758 and sat on a trial jury in December 1758.[221]

Experience also bred consistency. On one level the use of core jurors and substantially identical panels made perfect sense. Given the relatively small population base, it was not feasible to impanel a fresh jury for each case, as is the modern practice. At a deeper level, such an approach would have been antithetical to eighteenth-century trial practice. Experienced jurors were valued. Having observed and participated in other cases, a seasoned juror was far better qualified than a novice unfamiliar with how justices and jurors disposed of similar causes. And on a third level, one suspects that jurors attuned to how the

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[213] *Id.* (21 November 1746). Christian thereby qualified for fees for service in all three cases.
[214] *Id.* (September 1746).
[215] *See* Fairfax County, *supra* note 21, at Reel 37.
[216] *See* Augusta County, *supra* note 23, at Reel 62.
[217] *Id.*
[218] *See* Fairfax County, *supra* note 21, at Reel 37.
[219] *Id.* West's name appears as a justice of the peace on December 31, 1751. By 1754 he represented Fairfax in the House of Burgesses. *See* 1 THE PAPERS OF GEORGE MASON, *supra* note 21.
[220] *See* 5 THE PAPERS OF JOHN MARSHALL, *supra* note 91, at xliv.
[221] *See* Fairfax County, *supra* note 21, at Reel 38 (May 16, 1758) (December 20, 1758). There is no way of knowing whether Alexander's jury service was necessitated by a shortage of jurors or the desire to shape the verdict. Alexander also appeared as a plaintiff in a trespass-on-the-case action on June 20, 1758. He was represented by Attorney Benjamin Sebastian. Shortly thereafter, the court dismissed an unspecified presentment against Attorney Sebastian. *Id.*

court regularly resolves disputes were more likely to conform their own behavior accordingly, especially if their own personal interest was at stake in other cases.

In sum, colonial records belie a whiggish depiction of juries as bulwarks of individual freedom against preening judges applying an out-moded feudal law.[222] Juries and judges shared many of the same ideas, attitudes, and values. Nothing better illustrates the synchronization, and danger of manipulation, than the Augusta churchwarden cases of August 1750.[223] On a single day, it will be recalled; the court heard eleven jury trials, which it divided between two separate jury panels.[224] For the most part, each jury heard alternate cases and decided them identically: verdicts favored the plaintiff-churchwarden and awarded 1,000 pounds of tobacco.[225] Long before factories blighted the landscape, the churchwarden cases suggest the metaphor of "assembly-line" justice. With machine-like precision, the court granted each defendant a separate trial.[226] And in each the jury poured the evidence – whatever it may have been - into a pre-fabricated mold that produced identical verdicts.[227]

VII. "EVIDENCES" AND PROOF: THE CONDUCT OF THE COLONIAL TRIAL

Virtually the prototype of a society premised upon deference and hierarchy, the eighteenth-century trial reflected the priorities of an oral culture that valued face-to-face encounters and, to a degree, de-valued the written word. Indeed, its epistemology prized the spoken word, the inarticulable benefit of eye contact, and inductive reasoning based on unarticulated hunches. The physical space of the courtroom reinforced these attitudes by placing the primary actors in close proximity to one another. All could be seen. All could be heard. In addition, local juries apparently placed as much weight on what they knew before the case ever began as they did on the evidence formally presented. Nor were juries ever expected to rationalize or explain their verdicts.

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[222] *See* LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY (1999).

[223] *See* Augusta County, *supra* note 23, at Reel 62 (August 1750). The first trial of the day resulted in a verdict for 4,000 pounds of tobacco in favor of the churchwarden. The remaining ten trials resulted in verdicts for 1,000 pounds of tobacco. Two jury panels alternated trials for the first seven cases. The panel hearing the even-numbered cases (trials 2, 4, etc.) then heard trials 9 and 10, no doubt because both cases involved the same defendant, Richard Boden. The clerk made separate entries for trials 9 and 10, including the names of the jurors, which suggests that they were conducted as separate (but probably very brief) trials. The "odd" panel heard the eleventh case. One suspects that the unusual procedure was motivated by the court's experience with several identical cases that previous May, in which one jury hung and another refused to find damages. The suspicion that the two churchwarden panels in August were "specially struck" (e.g., handpicked) is deepened by the fact that the twelfth jury trial that same day involved a debt action between two private parties for which an entirely new panel is listed.

[224] *Id.*

[225] *Id.*

[226] *See* Augusta County, *supra* note 23, at Reel 62 (Aug. 1750).

[227] *Id.*

Reconstructing eighteenth-century trials is difficult. Trials were essentially unrecorded in the sense that no transcripts were prepared.[228] In part this was because colonial courts lacked the techniques and technology of modern court transcription services. Without transcripts, parties simply prepared a summary of "errors" that captured what allegedly went awry.[229] Yet, more fundamentally, a written record could not have captured the old-style trial anyway.

Lack of detailed records affirms that colonial trials were largely oral, face-to-face confrontations between parties and witnesses conducted under the watchful eyes of justices and juries. Put another way, trials were highly fluid events not susceptible to being "recorded" on paper. The trial was an event that occurred at a moment within the courthouse; simply recording what people said would have missed its essence. Although the clerk often noted the appearance of attorneys, trials were seldom derailed by numerous technical objections because few such rules existed in the late eighteenth century.[230] Indeed, the advent of technical evidence rules and the primacy of lawyer-advocates by the early nineteenth century marked a vastly different approach to trials.

Nor does one find any radical distinction between civil and criminal trials, as one finds in modern courtrooms.[231] Certainly the juries were asked to decide different questions, but beyond that one sees the same basic approach: a verdict based largely on jurors' sense of how a particular case should be resolved, informed but not rigidly bound by the "evidences" and the judges' statement of law. Some differences did, of course, exist. Virginia law provided that in criminal cases testimony by three witnesses was deemed sufficient to establish a fact. To prove a felony the prosecution had to produce a minimum of two witnesses, a rule with deep Biblical roots (Deuteronomy, 17:6).[232] In the main, however, eighteenth-century trials harbored little of the technical pretension that has transformed the modern trial into a maze of rules predicated upon a rational, objective, "search for the truth" directed by lawyer-advocates.

An outline of some of the key features of the colonial trial underscores its relation to a society steeped in a culture of deference and viva voce communication. First, the trial explicitly legitimated the jury's power to base its decision not just on the "evidence" presented by the parties, but on whatever the jury knew for itself. Second, a party's evidence had to fit within the traditions of an oral culture that granted primacy to viva voce testimony. Closely related, testimony had to be based on firsthand observations; the law abhorred "hearsay." Third, a person's reputation and character in the community figured prominently in the jury's evaluation of the case. Indeed, character was the eighteenth-century trial's centerpiece.

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[228] *See generally* Augusta County, *supra* note 23.

[229] *See* JULIUS GOEBEL, HISTORY OF THE SUPREME COURT: ANTECEDENTS AND BEGINNINGS TO 1801 19-29 (1971) (discussing common law appellate devices).

[230] *See* Gallanis, *supra* note 7, at 502.

[231] This is best exemplified by the penal "debt" action. *See supra* note 130.

[232] *See* RANKIN, *supra* note 196, at 96.

A. "Evidence" and "Jury Knowledge"

Colonial trials lacked the technical precision (and pretension) one finds in contemporary courtrooms. Indeed, the "evidence" in a modern trial is formally defined as the sum total of testimony and exhibits explicitly admitted into the record by the judge. Everything else, including opening statements, closing arguments, the judge's instructions, and even the lawyers' questions are deemed "not evidence." In theory, then, modern juries decide cases solely on this highly formalized understanding of "evidence," a concept reinforced by the juror's oath and prevailing legal fictions.[233]

The colonial trial was far more informal and dynamic. It was not unusual for juries to decide cases without hearing any testimony by "evidences," which is how "witnesses" were often identified in the order books.[234] In cases where parties did call witnesses, the extant record sheds little light on their testimony because the clerk never recorded their names or even noted the substance of their testimony.[235] Witnesses' names were listed only for purposes of calculating costs and identifying which party was responsible for payment.[236]

One's status in society affected one's eligibility to be a witness; eighteenth-century law categorized broad classes of people as incompetent to testify.[237] Witnesses had to be at least fourteen years old, the "age of discretion."[238] Convicted felons were generally deemed incompetent.[239] The bonds of marriage and the doctrine of coverture disqualified one spouse from testifying against another.[240] Religion was also critical; thus, a convicted "Popish recusant" could not provide evidence.[241] Quakers could "affirm" their testimony in civil actions but had to swear to tell the truth in criminal cases. Race also restricted the capacity to testify. Slaves, for example, could not testify against "'any *Christian* white person.'"[242]

The questioning of witnesses, if any, appeared to be fairly free form but proceeded in a definite order.[243] One finds virtually no trace of modern rules that regulate the "form" of the question (e.g., restricting "leading" questions). For the most part witnesses testified in "narrative" form, that is, he or she related what

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[233] *See* MCCORMICK ON EVIDENCE, *supra* note 15, at § 51, § 328.
[234] *See infra* note 251.
[235] *Id.*
[236] It is difficult to link witnesses to the cases in which they testified. Sometimes the clerk recorded the witness fees immediately after the trial, but quite often the court took up fees for all cases at the end of the day, perhaps so it could first complete other business. *See, e.g., infra* note 250.
[237] *See* SCOTT, *supra* note 130, at 93.
[238] For an excellent discussion of children's competency as witnesses, *see* Brewer, *supra* note 16, at 295-316. Brewer explores the link between trials and prevailing epistemology by exploring when and under what circumstances children were permitted to testify.
[239] RANKIN, *supra* note 196, at 96-99.
[240] *Id.*
[241] *The Statutes at Large, supra* note 22, at 6: 338.
[242] *Quoted in* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 229 (1996) (emphasis original). *See also* RANKIN, *supra* note 196, at 97-99.
[243] *See* Blinka, *supra* note 62, at chapter 6.

they "knew" about an event unimpeded by the "Q and A" characteristic of contemporary trials.[244] The party who called the witness might ask pertinent questions, following which the opponent had the opportunity to cross-examine.[245] Judges interceded freely, compared to their modern counterparts, often with pointed questions that revealed their predisposition about a case.[246] It also appears that jurors occasionally asked questions, although the extent of this practice is impossible to determine.[247]

Virginia practice also permitted "testimony" by judges and jurors in open court. Again, it is difficult to know how often this occurred or how long the practice persisted (it is manifestly prohibited by modern rules). Examples of judges leaving the bench for the witness stand occur in the 1790s, yet it would seem that judges could otherwise impart their views or information to juries.[248] And even if individual jurors rarely assumed the formal role of witness, the jury's collective knowledge supplemented, or perhaps even supplanted, whatever "evidences" were presented.

Indeed, juries often reached verdicts even where the parties called no "evidences" (i.e., witnesses). In Augusta County, for example, the clerk's entries distinguished a jury that heard "evidence" from one that retired "to say the truth of the premises."[249] In still other cases juries based verdicts "upon their oath."[250] The same pattern persisted in Fairfax County.[251] Jurors were drawn from the vicinage precisely because, as informed citizens, they could fill the gaps (or chasms) in whatever evidence was presented at trial. Even if a juror did not explicitly "testify" about what he knew in open court, his personal knowledge was expected to play a role in the verdict. George Webb's influential handbook

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[244] *Id.*

[245] *Id.*

[246] In an extreme example, during a 1746 trial in Augusta, the court convicted the Hon. Gabriel Jones of a misdemeanor for interrupting a witness who was giving evidence. Apparently, Jones threatened to arrest the witness. *See* Augusta County, *supra* note 23, at Reel 62, p. 81. Rankin notes that judges in the General Court could question witnesses in criminal cases, but does not comment on the frequency or nature of the judges' interrogation. *See* RANKIN, *supra* note 196, at 99-100.

[247] *See* Augusta County, *supra* note 23, at Reel 62 (Aug. 1746).

[248] *See* RANKIN, *supra* note 196, at 99, who asserts that there is no evidence that this practice occurred in the General Court. The federal treason trial of John Fries in the late 1790s is, however instructive. During the trial Judge James Peters, a presiding judge, left the bench and took the witness stand, where he told the jury about Fries's "confession" and related events. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 532-535 (1849; reprint, B. Franklin 1970) (summarizing Peters' testimony).

[249] *See* Augusta County, *supra* note 23, at Reel 62 (Sept.1746). The entries were made by the same clerk on the same day, which strongly suggests that the words were carefully chosen.

[250] *Id.* (Nov.1746). By contrast, nine witnesses applied for fees following a not guilty verdict in a slander case in 1750/51. *Id.* (2 March 1750/51).

[251] *See*, for example, the entries for the June 1752 sitting of the Fairfax Court. In recording a trial, the clerk sometimes wrote that the jury heard evidence and retired. In several instances, however, the verdict was delivered on the jury's "oath." *See* Fairfax County, *supra* note 21, at Reel 37 (17 June 1752). The court conducted three jury trials on June 17, 1752. Two entries refer to "evidences" and one describes a verdict based on the jury's oath.

for Virginia magistrates explicitly acknowledged that "[a] jury may find a [t]hing which is not given to them in [e]vidence, if they do know it of their own [k]nowledge: for they may inform themselves of the [t]ruth of the [f]act they are to try, by all possible lawful [m]eans they can, and are not tied to the evidence given at [b]ar only."[252] We must, however, be careful about the "self-informing" nature of colonial juries. It is extremely doubtful that jurors had directly observed the events being litigated at trial; rather, their knowledge most likely consisted of gossip (hearsay), conjecture, and familiarity with the character of those involved, as well as local customs and traditions.

In sum, eighteenth-century trials featured no finely honed definitions of "evidence" or solipsistic instructions that compelled jurors to decide solely upon what was spoken and explicitly approved by the judge within the courtroom. Determining "exactly" what happened was not the highest priority. Indeed, the juror's oath obligated him to decide the case "according to the best of [his] cunning," a striking figure of speech.[253] In early modern Europe, "cunning" was the opposite of a philosophical knowledge that depended upon "precise measurement or rigorous logic."[254] Cunning meant intuition, the reliance upon experience and conjecture, the unarticulated "hunch." And the whole notion of "cunning," as we will see, was well suited to a conception of trial that encouraged spontaneous verdicts with little or no deliberation based on information that inextricably blended the jury's personal knowledge with viva voce testimony.

B. Viva Voce Testimony

Eighteenth-century Virginia society was predicated on oral communication, in part because of low levels of literacy, but also because it prized the spoken word. To be sure, the legal system depended greatly on written records, including deeds vesting ownership in land, indentured labor contract, and bills of exchange. Yet the court formally received these writings by having them read aloud. In this way all persons present in court, those on business as well as the curious, witnessed the event – assuming they paid any attention to what was said. As Rhys Isaac observed, "in a world where oral culture was strong and custom ruled, the acts of authority were spoken aloud and so assimilated into the fund of necessary community knowledge accessible to all."[255] More practical concerns

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[252] *See* WEBB, *supra* note 195, at 198. Although juries properly drew upon their collective personal knowledge or the evidences, if any, it was misconduct for jurors to discuss the case with third parties. *E.g.*, Augusta County, *supra* note 23, at reel 62, 1 June 1751. In a rare move, the court overturned a verdict for the plaintiff in a debt action. Apparently two jurors had improper contacts with third parties. The clerk's brief entries noted that one juror ran out of the courthouse and the other jumped out of a courthouse window and "conversed with" another before giving a verdict. It is impossible to know what triggered this bizarre incident or whether it occurred during the "trial" or during deliberations, if any. *Id.*

[253] *Quoted in* RANKIN, *supra* note 196, at 94.

[254] WILLIAM EAMON, SCIENCE AND THE SECRETS OF NATURE 281-82 (Princeton University Press 1994).

[255] *See* ISAAC, *supra* note 56, at 91.

also supported the oral tradition. Virginia law required that in proceedings before the General Court the clerk must read aloud the written judgment so that corrections could be made.[256] The public reading, then, permitted those present to serve as "proof-readers" who guarded against scriveners' errors.

Viva voce testimony necessarily meant that "evidence" had to come to court and speak before justices, juries, and parties. Face-to-face confrontations were central to the workings of deference. Webb's handbook for justices inveighed against "privy verdicts" in serious criminal cases "because the jury are commanded to look upon the person at bar, when they gave their verdict."[257] In open court, witnesses testified before all. Witnesses, then, had to posses the temerity and strength of personal character to confront the opposing party. The jury listened to the witness's words and observed his or her demeanor. It was this demeanor, the outward appearance in dress, voice inflections, and bearing, that rendered the witness worthy of credit. The more impressive the witness, the more telling the proof.

Elections to the Virginia House of Burgesses provide a useful analogy.[258] On specially announced days at the county courthouse, candidates appeared in person to greet voters and witness the casting of ballots.[259] Voters approached candidates, who might be seated at tables, and announced their choice in a clear voice for the record.[260] The county election officer then recorded the vote in a poll book.[261] The candidate who received a voter's approbation might then publicly thank him for the support.[262] Such public displays of mutual respect undoubtedly affected waiting voters of more humble standing.[263] Thus, votes by the lower or middling-orders displayed gratitude or respect and, in turn, the elected office holder was expected to reciprocate.[264]

Being an "evidence" was potentially more demanding than casting ballots. Witnesses were expected to provide a narrative of events or an assessment of a party's character, based on personal observations. "Hearsay" was suspect because it involved what someone else had said outside the courtroom.

Nevertheless, the "rule" against hearsay was more a preference than a rigid exclusionary proscription, for narrative testimony invited untutored witnesses to pepper their accounts with what others said as well as what the witness saw firsthand.[265] Other rules specifically permitted the use of hearsay. Written

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[256] *See The Statutes at Large*, *supra* note 22, at 6: 337.
[257] *See* WEBB, *supra* note 195, at 352.
[258] *See* ISAAC, *supra* note 56, at 111.
[259] *Id.*
[260] *Id.*
[261] *Id. See also* E. Lee Shephard, *'This Being Court Day': Courthouses and Community Life in Rural Virginia,* 103 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 459, 466 (1995).
[262] *See* ISAAC, *supra* note 56, at 111.
[263] *Id.*
[264] *See id.* Isaac relies on an account of an election involving John Marshall near the close of the century, yet it seems to have portrayed accurately the practice before the Revolution as well. The incident is also a useful reminder that the Revolution did not sweep away all colonial political practices or vestiges of deference.
[265] *See* Gallanis, *supra* note 7, at 533-34.

depositions substituted for viva voce testimony upon a showing that the witness would be unavailable to appear in court. In addition, Virginia law permitted the use of "book accounts" as evidence, but only under tightly controlled circumstances.[266] The statute compelled merchants to bring their book to court long before any litigation arose and swear to its accuracy, a surrogate for testimony. The justices could peruse the book and, in effect, witness its accuracy themselves before the dispute ripened. By all indications the courts took their role seriously. In several cases the Fairfax court refused to receive book accounts as evidence, including a book offered by one of its own magistrates, because they had been sworn to in a neighboring county, not Fairfax.[267]

For witnesses the courtroom setting was intimidating, and deliberately so. Court day gathered together many of the most powerful and influential men in the county as litigants, attorneys, and court officials. Witnesses were summoned to cross the bar and take the "witness stand." Jurors stood nearby so that they could hear every word and closely scrutinize the witness's countenance. Elevated justices sat to the other side, prepared to pepper the witness with questions. In sum, the tradition of viva voce testimony involved more than an oral recitation of what the witness knew; it was an opportunity to test character as well.

C. Character and the Trial

The idea of "character," itself a contested notion, was at the heart of the old-style trial. Modern psychology largely discredits the concept, relegating character to the ashcan of popular misconceptions about how and why people behave the way they do.[268] Modern law is similarly uncomfortable about character evidence and largely precludes its use for propensity (e.g., for the inference that people behave in conformity with their character traits).[269] Despite the skepticism in today's learned professions, character remains a robust, enormously useful feature of popular culture, although one that has changed over time. In the 1760s George Mason wrote an "endorsement" on behalf of William Buckland, a former indentured servant who had worked for Mason and his brother Thomas. Mason described Buckland as a man of "very good character"

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[266] *See The Statutes at Large*, *supra* note 22, at 6: 53. For an earlier version of the book debt act, see *id.* at 4: 327-29. British merchants who persuaded Parliament to enact them may have prompted the book debt acts. *See* WOODY HOLTON, FORCED FOUNDERS: INDIANS, DEBTORS, AND SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA 65 (University of North Carolina Press 1999).

[267] *See* Fairfax County, *supra* note 21, at Reel 38 (17 August 1758). The disappointed plaintiff was the Hon. John Mercer, who had sworn the account before the Stafford court. The Fairfax court was being consistent, however. The day before it directed a verdict for the defendant in an assumpsit jury trial because the plaintiff had sworn his account before the Stafford court as well. The remaining evidence, if any, was insufficient.

[268] *See, e.g.*, Robert J. GATCHEL & FREDERICK MEARS, PERSONALITY 161-201 (St. Martins 1982).

[269] FED. R. EVID. 404 largely precludes any inference from character to propensity in civil actions and strictly limits its applications in criminal cases. The rule is based on nineteenth-century common law practice.

who was "honest, sober, and diligent" as well as a fine joiner and carpenter.[270] Implicit here is a distinction between Buckland's moral character and his skill as a worker. By the mid-nineteenth century, the distinctions had blurred. The term "character" now described a written reference by a former employer attesting to one's stalwart Victorian traits of thrift, industry, and frugality.[271]

Character assumed a protean quality in the eighteenth century, which is nicely illustrated by several colonial statutes authorizing courts to appoint commissions for specified tasks. In order to establish the location of public storehouses, the county court appointed "three or more good and lawful men of the county." In suits alleging broken fences, it appointed "three honest housekeepers of the neighborhood" to view the damage. The need for additional roads or milldams was to be investigated by "three or more fit and able persons."[272] When the General Assembly overturned a disputed vestry election, it directed the parish's "housekeepers and freeholders" to elect "twelve of the most able and discreet persons."[273] Although neither justices nor juries were obligated to accept the commissioners' reports on storehouses, fences, or roads, they provided a basis to proceed absent conflicting evidence.

In sum, character blended moral qualities, such as honesty and law-abidedness, with traits relating to physical or intellectual capacity, such as being "fit and able" to perform the assigned task. Ultimately, however, character was hopelessly vague. After all, who qualified as a "good and lawful man" and by what criteria? Still, ambiguity begets a fluidity and flexibility that perhaps explains why "character" is still a useful (if different) construct in our own time.

Character served two primary functions in colonial Virginia. In one sense, character was synonymous with reputation, that is, with what others thought of a person.[274] In a society that viewed itself as rank-ordered and hierarchical, character helped fix a person's place in the order and describe what was expected of him. People owed duties to those below them and were obligated to defer to those above. Breaches of duty and etiquette labeled one as unworthy of a particular status and, moreover, damaged a "good" reputation. A person might claim high status because of wealth or birth, but ultimately he was judged by his appearance and deeds.

Besides helping to fix one's station in the social firmament, character also provided valuable evidence of how a person most likely had behaved on a given occasion. This sense of "character" looks inward to the person's essence and

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[270] *See* 1 THE PAPERS OF GEORGE MASON, *supra* note 21, at 45-46.

[271] GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 32 (1994).

[272] *See The Statutes at Large*, *supra* note 22, at 6: 60 (public store houses), 38 (fence breaking), and 64 (roads, etc.). To similar effect, courts were to appoint one or more "fit and able" persons to view barrel staves, headings, and shingles intended for export. *Id.* at 233.

[273] *Id.* at 502.

[274] *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 37 (Oxford 1993) (drawing a distinction between a "public meaning" of character as "reputation" and a "private meaning" that resembles modern notions of "personality"). *See also* the entry for "Character" in THE BLACKWELL COMPANION TO THE ENLIGHTENMENT 80-81 (John Yolton, et al., eds., Blackwell 1991).

serves as a rough-and-ready psychology of crude determinism.[275] All things being equal, one assumed that an individual acted in conformity with his or her traits. Absent eyewitnesses, admissions, or documents, one used character to fill in the gaps.

Character was a central issue in eighteenth-century trials because it served both purposes.[276] First, character established the individual's place in society. Second, it was prized as a valuable, highly probative source of evidence based on the inference that persons generally acted in conformity with their character. Precisely because of its prevalence in the general culture, character was a quick, readily accessible, and efficacious means of proof within the courtroom. Demeanor (appearance) provided valuable clues to one's character, which helps explain why the law clearly preferred viva voce testimony and eschewed hearsay. Character could be inferred from a person's dress or manner of speaking. Moreover, the jury collectively, consisting of freeholders from within relatively sparsely populated counties, probably had a good sense about most of the people it saw. After all, "reputation" was nothing more than community "gossip." Most likely one or more jurors had heard rumors about parties, witnesses, or events. Character was also simple to prove, even for parties appearing without lawyers. Character witnesses testified to what they knew about an individual's reputation within the community, which supplemented the local gossip and the jury's assessment of demeanor.[277] Finally, character carried a multiplier effect. If one's character witnesses were themselves individuals of impressive standing within the community (men of "first character"), their high opinion of another carried all the more weight.[278]

Character served not only as a means of proof, it also influenced the etiquette and decorum of the courthouse. Notions of character suffused and defined how persons were expected to behave. Attorneys and parties formally addressed the justices as "Your Honor" or the bench collectively as the "worshipful court." An unspoken dress code dictated that justices and attorneys appear in wigs dressed in their finest clothes.[279] Thus, in dress and speech the court's most influential actors behaved as persons of refined character and high standing. The jury was accorded similar respect by the justices. Breaches of decorum were not usually

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[275] Character obviously loomed large in the popular psychology of the time, particularly the Scottish common sense school and its ideal of a "balanced character" in which "reason" prevailed over passion. *See* DANIEL W. HOWE, MAKING THE AMERICAN SELF 5-9 (Harvard University Press 1997).

[276] Beattie found this same emphasis on character in his studies of British criminal trials. *See* BEATTIE, SCALES OF JUSTICE, *supra* note 5, at 231-32.

[277] A slander trial resulting in a not guilty verdict featured 9 witnesses. Given the nature of the allegations (damage to one's reputation) and the large number of witnesses, it seems likely that most were character witnesses. *See* Augusta County, *supra* note 23, at Reel 62 (2 March 1750/51).

[278] For a discussion of character and reputation in the late eighteenth century and why George Washington selected men of "first character" for his first cabinet in 1789, *see* Elkins & McKitrick, *supra* note 274, at 53-54.

[279] *See* ISAAC, *supra* note 56, at 91 ("We must picture the gentlemen justices, bewigged and dressed in their fine coats and waistcoats . . . .").

tolerated. The court fined one drunken witness five shillings.[280] One suspects that flashes of temper or boredom were normally handled by unrecorded rebukes, but occasionally the court held even justices and attorneys in contempt for their misbehavior. In one telling instance, the court fined a justice for interrupting a witness.[281]

Character, then, was the linchpin of the colonial trial. In October 1774, the first Continental Congress praised the right to jury trial in its address to the "Inhabitants of Quebec." Most revealingly, Congress defined the jury trial in terms that stressed its preoccupation with character and reputation:

> [The right of trial by jury] provides that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him; a sentence that cannot injure him, without injuring their own reputation, and probably their interest also; as the question may turn on points, that, in some degree, concern the general welfare; and if it does not, their verdict may form a precedent, that, on a similar trial of their own, may militate against themselves.[282]

In short, the character and reputation of parties, witnesses, and jurors stood at the center of the trial, which, at some level, must concern itself with the "general welfare." Strikingly absent is any sense that a trial's primary purpose was to seek "the truth" or reconstruct the past.

VIII. JURY DELIBERATIONS

Jury verdicts had to be unanimous; unless all twelve jurors agreed on a finding, the court could not accept the verdict as legally binding.[283] Jury deliberations, then, present an opportunity for assessing both consensus and conflict among jurors themselves as well as between jurors and presiding justices. If verdicts reflect consensus, quick verdicts reveal unarticulated, deeply felt, and widely shared assumptions. Conversely, "hung" juries illustrate divisions and underscore the justices' lack of influence to caress, coax, or cajole jurors into reaching a verdict of any sort.

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[280] *See* Augusta County, *supra* note 23, at Reel 63 (November 21, 1760).

[281] *Id.* at Reel 62 (August 1746). In 1759 the court sentenced a witness to spend twenty-four hours in jail for "disturbing" other witnesses. *Id.* at Reel 63(August 18, 1759).

[282] *See Address to the "Inhabitants of Quebec," supra* note 18, at 694.

[283] *See* WEBB, *supra* note 195, at 194. *See also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 1768 at 375 (1766; reprint, University of Chicago Press 1979). Virginia practice conformed to this rule. All verdicts were unanimous; no dissents or fractional votes were observed. Today, many jurisdictions accept non-unanimous civil verdicts, most commonly five-sixths quotients.

The modern legal system perceives juries as archetypes of a "deliberative ideal."[284] Having heard the evidence, legal instructions, and arguments, jurors discuss the issues and deliberate. In this view, verdicts are the product of reason and reflection, the very antithesis of quick, unreflective decisions.

By these standards, the colonial jury disappoints. Verdicts arrived very quickly. In many instances it appears that the jury never left the courtroom. Nor was this aberrant or yet another indication of a flawed system run by inept justices who lacked formal legal training. The "deliberative ideal" simply did not predominate until the nineteenth century.

Undoubtedly the experience of contemporary English courts affected practice in Virginia. Unlike modern juries that cloister themselves in special rooms for secret deliberations that last days or weeks, eighteenth-century British juries decided cases quickly, publicly, and with little discussion. The manner of jury decision-making gave extraordinary advantage and influence to jurors with experience, particularly those familiar with the subject under litigation. Extensive work has been done on the operation of the English courts of assize and quarter session in the seventeenth and eighteenth centuries, especially in criminal cases.[285] County justices of the peace presided over the quarter session courts, which sat four times a year to hear jury trials in "less serious" criminal cases, such as petty larceny. The more powerful assize courts heard capital cases, including murder or grand larceny.[286]

British courts evolved a variety of procedures that bore directly on the conduct of juries. Late seventeenth-century English jurors participated in marathon proceedings in which as many as twelve or more trials were presented to a single jury before it retired to decide all twelve cases at the same time.[287] Even with the aid of notes, jurors struggled, often unsuccessfully, to keep the distinct facts of each case in mind. Further compounding the jury's predicament, the court could order that it be kept together without "meat, drink, fire, or candles" until a verdict was reached.[288]

By the 1730s juries delivered verdicts after the evidence and instructions were presented in each case.[289] To facilitate decision-making, the Old Bailey's (the London criminal court) judges ordered that jurors be seated such "'that they might consult one another, and give in their verdict on each trial

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[284] AKHIL AMAR, THE BILL OF RIGHTS 81-118 (Yale University Press 1998). *See also* JEFFREY ABRAHAMSON, WE, THE JURY 17-55 (Basic Books 1994).

[285] *See* BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5; J. H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, *in* CRIME IN ENGLAND 15 (J. S. Cockburn, ed., Princeton University Press 1977).

[286] *See* BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5, at 16; Baker, *supra* note 285, at 27-32.

[287] BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5, at 395. Beattie observes that juries often heard a dozen cases "with hardly a pause."

[288] *See* BLACKSTONE, *supra* note 283, at 3: 375. Webb recites the same rule, but the records do not reflect that judges exercised this authority. WEBB, *supra* note 195, at 197.

[289] *See* BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5, at 396.

immediately.'"[290] Not only did this procedure assist jurors in recollecting the testimony, it also resulted in even faster trials and quicker decisions. Jurors briefly "huddled" together before announcing the verdict, leaving the courtroom to deliberate only where the issues were especially complex or difficult.[291]

The new procedures fostered changes in courthouse architecture. By 1724 English courtrooms featured jury boxes, which allowed jurors to sit together rather than in different places, as had been the practice earlier. Close proximity fostered face-to-face confrontations and nonverbal communication essential for rapid verdicts. For more difficult cases that required a jury to "retire" and deliberate, English courthouses of the later eighteenth century offered "jurymen's verdict rooms."[292]

Discussions among British jurors typically lasted no more than two or three minutes. Jurors cast no ballots nor took formal votes. Most likely, one or two "dominant" members quickly surveyed the jury and sought prompt acquiescence to their view.[293] The dominance of the lead jurors was predicated on their prior experience as jurors and concomitant familiarity with the legal and factual issues before the court.[294]

Similar patterns of decision-making appear in the Fairfax and Augusta court records. There are few indications of long, protracted deliberations. The judgment entries read with formulaic regularity that "the jury went out and in a short time returned to the bar" with the verdict.[295] Rarely does one find any

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[290] *Id.* at 396, *quoting* LONDON EVENING POST, 5-7 Dec. 1738.

[291] Deliberations in the courtroom presented other problems, however. The courts were often "noisy and crowded." Moreover, cramped quarters often placed jurors in close proximity to parties and spectators. In short, the atmosphere was not conducive to calm careful reflection. *Id.* at 399.

[292] *Id.* at 397 n.205. Beattie observes that these rooms were incorporated into the new county and shire halls built after 1750 but suggests that they were not used very often. Roeber avers that most tidewater courthouses were modeled after the capitol in Williamsburg, which contained "two rooms reserved for the deliberations of the jury." ROEBER, *supra* note 10, at 79. A "conjectural" first floor plan of the 1770 Williamsburg courthouse reveals four rooms adjacent to the courtroom, two on each side. None are denominated "jury room," nor is there a clearly identifiable "jury box" within the courtroom itself, although there is seating for twelve or more people in addition to the judges, lawyers, and parties. First Floor Plan of 1770 (Conjectural), *supra* note 192. Konig's description of the Williamsburg courthouse omits any reference to a jury box or jury room. *See* Konig, *supra* note 61, at 2-5. Clearly, much work remains to be done on the layout of the eighteenth-century courtroom. We know that as early as 1699 some courtrooms featured a separate curvilinear bar for the jury located directly in front of, but below, the judges' bench. *See* PETERS & PETERS, *supra* note 190, at 22. The Fairfax County courthouse built in 1799, modeled on the "English town-hall type," featured a ground floor courtroom and second-floor jury rooms. *Id.* at 35-36. Assuming that the Fairfax jury rooms were intended for deliberations, we do not know the extent to which other courthouses of the colonial and Revolutionary periods also featured jury rooms, or if they were used for this purpose. Lounsbury reports that magistrates, clerks, and lawyers often took over such rooms for their own needs. *See* Lounsbury, *supra* note 190, at 222.

[293] *See* BEATTIE, CRIME AND THE COURTS OF ENGLAND, *supra* note 5, at 397 (juries briefly "huddle[d]").

[294] *Id.* at 397-98.

[295] *E.g.*, Augusta County, *supra* note 23, at Reel 62 (August 1746). There are other slight variations, such as the jury "went out of court to consult of their verdict and returned . . . ." *Id.*

reference to deliberations lasting from one day to the next. In a court that might hear over ten jury trials on a given day, usually involving jurors who served on more than one case, the pace alone belies anything more than a brief huddle among jurors. Overnight deliberations were rare. Moreover, in a number of instances the clerk made no reference to the jury "withdrawing" or "retiring" from the courtroom, which strongly suggests that jurors rendered their verdict while standing in the box.[296]

Conditions in Virginia thus were compatible with and probably promoted quick verdicts. The jurors' oath directed them to decide the case to the best of their "cunning," which explicitly sanctioned an intuitive, often unarticulable decision based on feeling, instinct, and even emotion. Character evaluations especially lend themselves to unarticulable "feelings" about what certain "types" of people deserved or were likely to have done. In addition, the crush of court business, which pulled in many different directions, did not lend itself to leisurely, reflective examinations. Neither justices nor jurors would have approached a trial much differently than a decision to build a road or mill. Deciding the "general welfare" did not usually depend upon determining what "in fact" had occurred. Overwhelmingly, juries returned "general verdicts" that blended fact and law and thereby gave the jury freer reign to ignore the law, or inconvenient facts, if it chose.[297] Rarely used, special verdicts appear in less than one percent of all cases.[298]

The colonial court records demonstrate a consensus among jurors and justices that reflects something more than the paucity of rules permitting judges to interfere with verdicts. Juries reached verdicts in nearly all cases, yet justices overturned very few.[299] Of the 273 trials examined, the court set aside verdicts in only three instances.[300] The apparent harmony between judges and juries is all the more remarkable because Virginia's judges, unlike the English practice, were

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(May 30, 1751). In Fairfax the clerk often noted, that the jury "heard evidence, withdrew, and afterward brought in a verdict . . . ." Fairfax County, *supra* note 21, at Reel 37 (March 30, 1750).

[296] *See, e.g.,* Fairfax County, *supra* note 21, at Reel 37 (June 17 and 18, 1752 and July 24 and 25, 1752). Some entries for these days reflect that the jury "retired," and others do not. The variation suggests that the difference in wording described the jury's actions rather than the clerk's arbitrary usage. The same pattern is found in the Augusta order books. *See, e.g.,* Augusta County, *supra* note 23, at Reel 63 (May 1759) (no entry that the jury retired or withdrew).

[297] More rarely, the losing party complained that a jury erred by following the law. *See, e.g.,* Fairfax County, *supra* note 21, at Reel 37 (March 30, 1750). The defendant, who lost a debt case, observed in his assignment of error that the plaintiff was an assignee who brought the action under an act of the assembly that had cut off the defendant's claim against the assignor. The defendant claimed that his legal counterclaim against the assignor actually exceeded the plaintiff's claim against him, but the jury "took no notice of this."

[298] Special verdicts were recorded in just two of 161 cases observed in Augusta County and in 2 of 112 cases examined in Fairfax County.

[299] Augusta averaged one "hung" jury per year. Fairfax recorded no hung juries in the years 1750-1752 (sixty jury trials) but listed three of fifty-two (about 6%) in 1758.

[300] Augusta's court granted two new trials and Fairfax recorded only one, which involved an unspecified dispute between Thomas Lord Fairfax and Philip Alexander, both powerful men in the county and members of the commission. *See* Fairfax County, *supra* note 21, at Reel 37 (17 June 1752).

generally prohibited from commenting on the evidence or summing up testimony, a technique that inevitably imparted the judge's view of how the case should be decided. By not summing up, the judges refrained from "invading" the jury's province.[301] The doctrine implicitly recognized that the jury was sovereign within an ill-defined sphere, yet judges and jurors evaluated disputes in much the same way.

Nonetheless, harmony did not always prevail. Exasperated magistrates sometimes found themselves as losing parties in lawsuits.[302] Judges had little control, direct or indirect, over how a jury decided the action. There are isolated instances of juries obstinately refusing to do the court's bidding. One churchwarden-plaintiff in a debt action moved the court "to direct the jury to retire and find some damages" against the defendant, who apparently refused to support the local parish financially. The jury retired, again, and when it returned persisted in its refusal to find damages. The court then gave up and ordered a new trial.[303]

Consensus dominated, however, and the one-penny verdicts illustrate shared attitudes, outlooks, and experiences among jurors. Colonial juries frequently found damages of one-penny, particularly in debt actions, which points to a customary resolution that prevailed in both Augusta and Fairfax counties. A one-penny finding carried both symbolic and legal significance. Legally, a one-penny damage award (or its equivalent) apparently barred the plaintiff from recovering costs.[304] Symbolically, the finding simultaneously vindicated yet tempered the plaintiff's right to recovery. Augusta's juries returned one-penny awards in eleven of seventy debt cases (in addition to an award for principal and interest) and in a single trover case, but never in an assumpsit action. Fairfax juries made more extensive use of one-penny findings. Between 1750 and 1752, they returned one-penny awards in seven of twelve (58%) debt cases and in a detinue action involving a "negro."[305] Moreover, tidewater juries entered a variant "one-shilling" finding in one assumpsit case, one action involving "scandalous words," and one assault and battery claim.[306] In 1758, perhaps pressed by a wartime economy, Fairfax juries used one-penny findings in ten of thirteen debt cases, but with an interesting twist. In three instances they awarded

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[301] *See* 5 THE PAPERS OF JOHN MARSHALL, *supra* note 91, at xliiv.

[302] A particularly petulant episode involved a slander action brought by a Robert "Boggess" [sp.], against Gentleman Daniel McCarty. On June 28, 1750 a jury convicted McCarty and found damages of one shilling even though McCarty had called eight witnesses and the plaintiff called none. On June 30, 1750 the court refused to grant McCarty a restraining order against Boggess that would have prevented him from keeping a public house in the future.

[303] *See* Augusta County, *supra* note 23, at Reel 62 (22 May 1750).

[304] *See* Fairfax County, *supra* note 21, at Reel 37 (5 July 1750), where the court ruled that a one-shilling verdict precluded plaintiff from recovering costs. I equated findings of one shilling, one penny, and one pound of tobacco.

[305] *Id.* (July 1752). A "detinue" was basically a "repossession" case. The jury awarded 260 pounds sterling for the slave in addition to the one-penny damage award.

[306] *Id.* (March 1750, assumpsit); (June 1750, scandalous words); and (July 1750, assault and battery).

"one pound of tobacco" and in another the defendant was given the option of paying "one penny or one pound of tobacco."[307]

Justices sought consensus, especially on their terms. The churchwarden cases tried in Augusta during 1750, described earlier, strongly suggest jury packing. In a single session the court tried sixteen cases over two days, all involving "debt" actions brought by a churchwarden.[308] All resulted in plaintiffs' verdicts and nearly all awarded damages of 1,000 pounds of tobacco.

Just as verdicts signal consensus, hung juries reflect occasional conflict among jurors. A jury's inability to agree on a verdict meant that one or more jurors refused to conform his opinion to that of the others, yet this rarely occurred in the records examined; less than one jury per year was unable to reach a verdict. In all instances the courts followed the same procedure. With the consent of the parties, one named juror was "withdrawn" and the rest of the panel discharged.[309] The juror "withdrawn" was apparently determined by a random drawing; he was not a holdout who refused to agree.[310] Unfortunately, the sources examined do not show what divided the jurors in any particular case. Nor can we be sure how a "hung" jury was determined. There is no indication that dysfunctional juries were forced to deliberate or held against their will without food, fire, drink, or candle, as Blackstone suggested.[311]

In summary, the pattern of verdicts reveals that juries quickly reached decisions in a vast majority of cases with little or no deliberations. The entries betray a staccato-like quality: trials were short, separate events. Juries listened to brief testimony or arguments and made up their minds, often without leaving the courtroom. The same pattern persisted into the 1790s, although it was viewed quite differently by the generation that fought the Revolution and struggled to build republican governments.[312]

IX. CONCLUSION

The eighteenth-century jury trial is an odd institution if measured against the paradigm of its modern counterpart: namely, a crucible in which adversaries present all available evidence to lay jurors, who patiently sift through a welter of

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[307] For the one pound of tobacco awards, *see id.* at Reel 38 (March, August, and December 1758). The "option" verdict appeared in December 1758.

[308] Augusta County, *supra* note 23 (30 and 31 August 1750).

[309] In Britain this same procedure was followed when parties decided to settle a case after trial began or when the court decided to take other action, such as to suspend proceedings, to take a jury view, or to refer the matter to arbitration. JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1: 156-157 (University of North Carolina Press 1992).

[310] MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 88 (Princeton University Press 1978).

[311] The sole exception is the debt action by the Augusta churchwarden, which was tried in May 1750. After the jury initially refused to find damages, the court ordered it to retire again and arrive at a verdict. Although the jury retired for a second time, it did not return with a damage award and was dismissed.

[312] *See* Blinka, *supra* note 62, at chapters 4-6.

uncertainties before deciding "what happened" and applying the law. In theory, the modern jury's decision is the product of rational deliberation, based exclusively on the evidence, legal instructions, and arguments presented - during trial - in the courtroom, the "laboratory of truth."

The colonial trial was more a social and political instrument that modestly eschewed quasi-scientific pretensions. The colonial courtroom struggled to institutionalize a hierarchical society, mediated by deference, in which the social orders worked together to resolve disputes. Quick verdicts, brief deliberations, and scant evidence (if any) strongly suggest that the trial was designed to resolve disputes in an amicable manner, and one in which "searching for truth" was not narrowly focused on precisely reconstructing past events. In finding "facts," juries blended their common knowledge, which usually centered on the parties' character, with the "evidence," assuming there was any. Nor was the "law" any more certain. Jurors inevitably blurred local customs, their own experiences, and the varied, often conflicting, statements by presiding judges, not to mention competing views of counsel. Verdicts embodied the jury's judgment about the "general welfare" in the broadest sense. The decision was as much emotional and reflexive as it was rational, predicated upon unarticulable reasons and feeling.

Certainly the older form of trial had its colonial critics, but change awaited the Revolution. These changes heralded a dramatically altered role for the courtroom and trial in the new republic, namely, as the laboratory of truth in which the search for the past preceded with near-scientific precision, yet one that reverently retained and accommodated the trappings of eighteenth-century deferential culture. The truly interesting phenomenon is the persistence of deferential trappings in American law even after 250 years. In politics, the deferential style quickly eroded in the 1790s and had all but vanished by the 1830s, yet the American legal system continues to embrace a deferential style that subsumes values of professionalism, expertise, and technical learning in the place of a hierarchical model of society.[313]

[313] *See* JAMES R. SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS, at ch. 4 (Yale 1993) (on the rapid collapse of deference in American politics).